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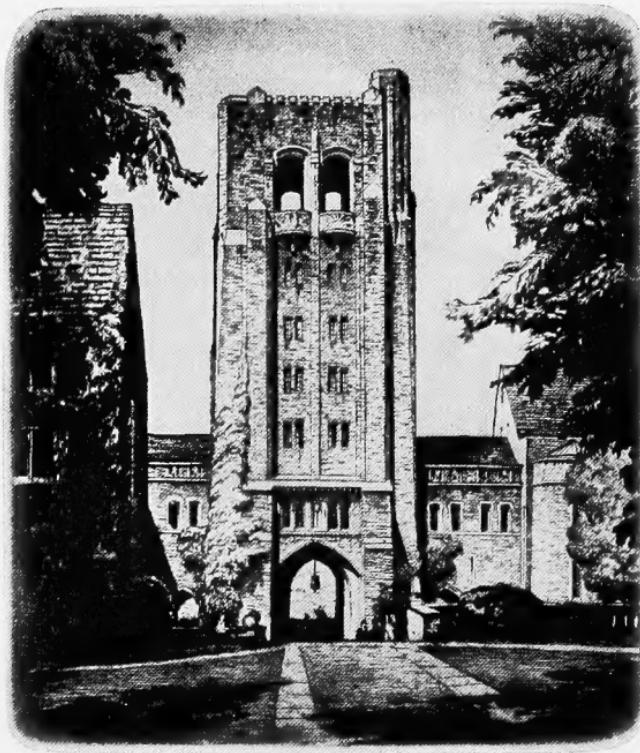
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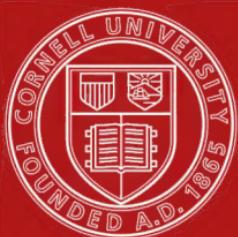
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A TREATISE
ON THE
LAW OF PARTITION
OF
REAL AND PERSONAL PROPERTY.

BY
CLARK D. KNAPP,
COUNSELOR AT LAW, AND AUTHOR OF "KNAPP'S POOR LAWS."

LEX EST DICTAMEN RATIONIS.

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PREFACE.

IT is difficult for the lawyer in active practice to write a treatise upon any topic. And yet it seems to me that a law-book would be almost worthless if written by one having an order of the Supreme Court at general term, saying that he is an attorney and counselor at law, but having no practice. Almost every day the practitioner wonders why courts cannot and do not agree with each other, and he congratulates himself whenever he finds that some certain court has been consistent with itself. As a usual thing a court of last resort is consistent with itself and with common sense and good law. If a court of last resort becomes inconsistent in its rulings, one will generally find that it has undertaken to distinguish one case from another; and in this *distinguishing*, as it is termed, the best court in the world will overrule itself, and then the practitioner and the author find the law in doubt. The practitioner guesses at the law,

citing the case in his favor, hoping that his opponent will not find that the court has seen fit to overrule itself by getting behind that peculiar legal convenience, to wit: the word "distinguished." This will explain why the law writer will sometimes place before his reader contradictory law. I will admit that, in a few instances, such will appear to be the case in this work. But I believe that this is as free from contradictions as any text-book.

This work is a careful collection of the law, as it has been settled, from time to time, by the courts upon that important question, Partition. Now and then different rules have been laid down; but, in each case, I have attempted to give the reasoning of the court or courts laying down the rules; and thus the student and practitioner is informed of the course of reasoning of the courts, and can follow the precedents, until one or the other shall be settled as the law, for certainly one rule or the other will be established and will govern. The law pertaining to Partition, with but few exceptions, is well settled—there being now but few questions that are doubtful, and upon which the views of some of our best courts differ. It is not the nature of the American courts to be inconsistent with each other or with themselves for a great length of time.

Of the merits of this work, if it has any, I have nothing to say. The author is indiscreet that does that. Let him launch his book upon the sea of public opinion. If the work is worthy and has merits, it will be a success; if not worthy and having no merit, it will sink. I now launch this work upon that great sea, which, upon matters of this kind, has neither sympathy nor favoritism. I trust that it will not sink.

CLARK D. KNAPP.

ALBION, N. Y., November 1, 1887.

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THE
LAW OF PARTITION.

CHAPTER I.

INTRODUCTORY.

THE original acquisition of title to land in England was by conquest. In America, it was by the right of discovery. The right of discovery in America has been recognized by all European nations that have obtained a footing upon American soil. The sovereignty making the original discovery was admitted to have absolute dominion and ownership over the lands discovered. The crown of England, by virtue of discovery, was invested with the title to most of the lands in the United States.¹ That portion of the United States known as the French Colonies, was claimed by France by right of discovery. The same claim was sustained by Portugal to what was known as the Brazils in South America. In fact, our whole country has been granted, by right of discovery by the crown (mostly by the

¹ *Johnson v. McIntosh*, 8 Wheat. 543.

crown of England), while the lands were in the occupation of the Indians. By these grants, the soil and right of domain were conveyed, and the titles to land are much dependent on these grants. When the United States acquired the lands belonging to other nations by right of discovery, it acquired the same rights to which the nation making a discovery was entitled. The government acquiring the rights to the soil and to the domain, grants rights of property in the soil to individuals, and thereby the foundation for co-tenancy was laid,* that is, joint tenancy and tenancy in common—the term joint tenancy being now but little known in American law, though cases of joint tenancy, sometimes, technical in their nature, are presented to the American courts for decision.

Sovereignty over lands in any territory of the United States can never be in abeyance. Whenever our government acquired lands,—as, for instance, upon the acquisition of California from Mexico,—it acquired the sovereignty as well as the fee in all the public lands within the acquisition, and the full right to dispose of such lands as it may see fit. As soon as a Territory shall become a State, the title to the public land passes to the State, and the State may grant the land and pass title to individuals.²

* The following are of interest on questions pertaining to land titles. Sullivan on Land Tit. c. 2; 1 Bl. Com. 107; 2 P. Wm. 75; 5 Pet. 48, 49, 70; 6 Id. 544; 9 Id. 746; 12 Id. 436; 16 Id. 409; 8 How. U. S. 232; 19 Id. 501; 23 Id. 463; 11 Wall. 619; 17 Id. 243; 19 Id. 593; 5 Otto, 525; Bald. 220; 1 Paine, 471. Most of these cases cite *Johnson v. McIntosh*, 8 Wheat. 543; see *Fletcher v. Peck*, 6 Cranch, 646; *Jackson v. Wood*, 7 Johns. 296; *Campbell v. Hall*, 1 Cowp. 204; 1 Ves. 445; 7 Niles Reg. 229; *Martin's Law of Nations*, 67, 69.

² *People v. Folsom*, 5 Cal. 373; *Friedman v. Goodwin*, 1

The principle of American law has been to uphold individual property and individual rights, and to encourage such ownership with the people. The absolute right of every man, inherent under the American and English law, is that of property, and the right to use, enjoy and dispose of such property at will. This right gives to the owner the power to control his or her property, and to enjoy, as his own, the proceeds of, or acquisitions from such property.³ When the ownership is a joint ownership in common, the law extends to each the same protection, and demands of each co-tenant the same regard for his fellow co-tenant, and grants to each the same equities, and gives to each the right to separate his common interest from the rest, and to enjoy his own part of the property separately. Such separation must be upon an equitable basis. This individual right of property, and the regard of the law for private property, is one of the great principles of the great charter of England, which declares that no freeman shall be disseized or divested of his freehold, or of his liberties or free customs, but by the judgment of his peers, or by the law of the land. This principle has been strengthened by statutes enacted by the legislative bodies of civilized nations to the stronger and more beneficent principle that no man shall be disinherited, nor put out of his franchise or freehold, unless he may be duly brought to answer, and given the privilege to show why he should not be disseized, disinherited or dispossessed of his property, and that he might be forejudged by due course of law. If anything be done contrary to this, such

McCall C. C. 142; *Pierce v. Morrill*, 26 Cal. 353; *Martin v. Waddell*, 16 Pet. 367; see 14 Cal. 375; 17 Id. 199; 3 How. U. S. 230; 8 Barb. 189; 19 N. Y. 96.

³ 1 Blackstone, 139.

act shall be redressed and holden as void. The law holds the rights of persons so sacred that the nation making the law is in no way allowed to interfere with the rights of its subjects in property without making a proper compensation therefor. And it may be stated as a general rule that a nation which by its law disregards the individuality of property disregards civilization and common honesty. Private property shall not be taken from any person without proper compensation is made therefor. This is an American principle in its strongest sense.⁴ The law of partition is the outgrowth of the ownership of land by coparceners. "Parceners," or coparceners are, so called because the lands of which they are parceners may be partitioned or divided among them. There may be parceners by common law and parceners by custom.⁵

"As to parceners by common law, if a man dies, intestate, seized of lands in fee, and leaves only daughters, the lands will descend equally to all the daughters, or, if he has no daughters, and no brothers, the lands will descend equally to all his sisters, if he has any ; and, if there are no nearer heirs, the lands will descend to his aunts. The descent is the same if a man dies seized of lands in tail, except where such estate in tail was limited to such man and the heirs of his body, for in that case the lands only descend to those who are heirs of the body. In all cases where several females take one inheritance by descent, they are called parceners : and all lands or tenements, including a rent-charge, may descend in this manner. If there be a title of dignity descendible to heirs of

⁴ N. Y. Const. art. I. § 7 ; see other State constitutions, and the law of Eminent Domain.

⁵ 17 Penny Encyclopedia, 242.

the body, the lands and tenements belonging to it may descend to parceners, but the dignity itself does not descend, for all the parceners only make one heir, and a title of dignity is not in its nature divisible: the dignity, therefore, will be in abeyance.”⁶ The above, quoted from Barron, is an ancient definition of parceners, and an old-time view of the law pertaining thereto, and is given that the student may by reading see the difference which has been made by time and the greater wisdom and liberality of law-makers, and fully understand the sacredness of individual rights. Now, the term parceners is but little used, and in time, as a law term, may become purely a matter of history.

Partition is the severance of undivided interests in common property. Parceners were first allowed to make partition of land among themselves. The Court of Chancery, in course of time, acquired a jurisdiction in these matters, and a bill could be filed in chancery praying for partition, which prayer would be granted on the parcener making out, or proving title. The *modus operandi* in the Courts of Chancery, was by issuing a commission out of the court to commissioners, who would go and divide the lands, upon which the parties would execute mutual conveyances. Then the parties held their lands separately. The writ of partition was abolished,⁷ since which partition can only be enforced by a suit in equity brought for that purpose, though questions of law and fact,—such as disputed title,—may in some instances be tried. The statutes and the code practice in some States allow this, deeming it best, and prohibiting a multiplicity of suits.

⁶ Barron, 488.

⁷ 3 & 4 William IV. c. 27.

Littleton says that parcelers are so called: "Because they may be constrained to make partition." And he mentions a number of ways of making partition, four of which are by consent, and one by compulsion.⁸ Blackstone, in commenting upon Littleton, says: "There are some things which in their nature are impartable. The mansion-house, common of estovers, common of piscary, uncertain, or an other common, without stint shall not be divided."⁹ The estate in coparcenary may be dissolved, either by partition, which disunites the interest, by alienation, or by death, vesting the title in the living by heirship.¹⁰

The jurisdiction of courts of equity in cases of partition is, without doubt, very ancient. By some writers this jurisdiction was considered a usurpation, and that it was an unrighteous authority assumed upon the part of courts of equity. It is admitted that the jurisdiction of courts of equity dates back to the reign of Queen Elizabeth,¹¹ a period so remote that, at least, one-half which at present is termed the common law, and which regulates the rights of property, and the operation of contracts, has originated since that time, and much of the ancient law and practice has been abrogated by more wise and more liberal law.

It is generally supposed that a writ of partition would lie only between coparceners. Until the reign of Henry VIII. this writ of remedial justice received a narrow construction, and with such narrow construction was the known and settled doctrine. Undoubtedly, in the courts

⁸ Littleton, § 309.

⁹ 1 Blackstone, 190.

¹⁰ 1 Blackstone, 191; Litt. 292.

¹¹ 1 Fantl. Eq. b. 1, ch. 1, § 3, note.

it met with opposition, as the general laws then favored estates in tail, and not a commonalty of interests in property. It would appear that the principal spirit of the law was to favor the sovereignty of the crowned head and of the church, and to build up and strengthen a nobility, and not to assist the people in their personal and private rights. The law received such a narrow construction that the alienee could not have partition against the parcener, and the tenant in common against his co-tenant. Notwithstanding the law was silent as to the alienee and tenant in common, and notwithstanding that by reason of silence and of the position of the parties, it was upon its face that it constituted a clear case for the interposition of the Court of Chancery, upon the ground of the total defect of any remedy at law, and yet, considering the unquestionable equitable right of the parties to partition, that right was denied. Such was the condition of the rights of the property, especially in cases of a community of interests until the statutes of 31 Henry VIII. ch. 1, and 32 Henry VIII. ch. 32, and up to that time no writ of partition for a joint tenant or a tenant in common.¹² Without a doubt, gross injustice was often the result of the narrow rule.

The statutes of Henry VIII. allowed compulsory partition between joint tenants and tenants in common, of any estate, or estates, of inheritance in their own right, or in the rights of their wives. By the last act, the one in the thirty-second year of his reign, partition was allowed where some of the tenants had estates for a term of years, or for life, with other that had estates of

¹² Co. Lit. 175, a; 2 Bl. Com. 185; *Burning v. Nash*, 1 Ves. & B. 555; 1 Story's Eq. 602, § 647.

inheritance or freehold in lands. It was only allowed where there was an actual tenancy or holding of lands of the parties to the writ. In case of remainderman, another writ against them was necessary, when his estate fell into possession.¹³ In the absence of any statutory or code regulation, the common law must govern, receiving from the court its most liberal construction in favor of all the parties to the action. Our statutes have deprived the common law of many of its inconsistent and inequitable doctrines. They have also enlarged the powers of the courts, so that now where there is a joint interest in property, that interest may be severed upon just and equitable principles, and the interest of all parties receive protection by the court, even going so far as to allow and decree a compensation to be made to one or more of the parties by the others, so that the severance of their shares may be equitable.

In the United States, technical joint tenancy is for the most part nearly abolished. The majority of all cases in partition that arise in this country are between tenants in common, there being no entail, and a due regard upon the part of the law for personal rights and undivided property has brought this change, which is a great illustration of the wisdom of our form of government.

¹³ Lit. R. 300; *Sullivan v. Sullivan*, 66 N. Y. 37; *Broome & Had. Com.* 71.

CHAPTER II.

CO-TENANCY.

THE American law as to tenants in common differs somewhat from the English law. The English rule is, that tenants in common are such as hold by several and distinct titles, but by unity of possession, "because none knoweth his own severalty, and therefore they all occupy promiscuously."¹ But the American rule is, that tenants in common are persons who hold by unity of possession. Such persons may hold by several and distinct titles, or by a title derived at the same time, by the same deed, devise or descent.² In all cases of tenancy in common the tenants are deemed to each have a separate and distinct freehold, which is a leading circumstance in, and a necessary element of a tenancy in common. Each tenant is considered as being solely and severally seized of his share, and as having the right to govern and control the same. He is not a copartner of his co-tenants in common and he has no control of their share or interest in the land, neither is he in control or possession of the shares of his co-tenants.

Tenants in common are accountable to each other for the profits of the estate ; and if one of them turns another out of possession an action of ejectment will lie against

¹ 2 Black. 192.

² 4 Kent, 387.

him.³ If one of them receive more than his share of the hire of the property, he is liable to his co-tenant.⁴ This has been frequently held in New York courts, and is also the rule in Massachusetts.⁵ Where one of several tenants in common is in occupation of the premises he is not chargeable with rent, but must pay for repairs, interest and taxes. In the case here cited, the distinguished judge who gave the opinion upon which the decision of the general term was made, says that the term "repairs" means ordinary repairs, and not improvements.⁶ By this it would seem that one tenant in common can not make improvements upon the property owned in common at an expense to his co-tenants. It is easy to see the reason for this wholesome rule: if the rule were otherwise, one co-tenant might ruin his fellow-tenants. One tenant in common is not liable to his co-tenants for mere occupancy, but may be liable where he has received rents from others for the premises or part of them, or where there has been an agreement to pay, or a waste committed by the removal or sale of the common property.⁷ One tenant in common is liable to another for waste, such as cutting down and clearing wood from land,⁸ the statute giving damages to one tenant in common for waste by another, only where the tenancy is admitted.⁹ In North Carolina the statute is confined to cases of permanent injury.¹⁰

³ *Bouv. Law Dict.* 712.

⁴ *Cochran v. Carrington*, 25 Wend. 409.

⁵ *Brigham v. Eveleth*, 9 Mass. 538; *Small v. Robinson*, 9 Hun, 418. See 3 *Pick.* 420.

⁶ *McLear v. De Laney*, 19 *Week. Dig.* 252.

⁷ *Vanderzee v. Slingerland*, *Id.* 107, citing 18 Hun, 153; 18 *Barb.* 265; 44 *Id.* 447; 66 *Id.* 553.

⁸ *Johnson v. Johnson*, 2 *Hill (S. C.) Ch.* 277.

⁹ *Prescot v. Nevers*, 4 *Mas. (C. C.)* 326.

¹⁰ *Smith v. Sharpe, Busb. (N. C.) L.* 91.

Where a petition for partition is pending an injunction against waste will be granted in proper cases.¹¹ But after partition has been decreed the tenant will not be enjoined from farming contrary to the custom of the country.¹² Tenants in common can do no wrong as against the other. Care and discretion must be used in the care of the property owned in common, by the tenant, or his agent having the immediate care, custody, or possession of the same. One tenant in common or joint tenant may maintain trover against his co-tenant for the improper sale or the destruction of the common property held in tenancy.¹³ The interest of the tenants in common in the property is an interest in which each has a property right that can not be disturbed by the other. An action will lie where one co-tenant applies the property exclusively to his own use, to the total exclusion of his co-tenants, and refuses to sever where severance is possible.¹⁴ The mere withholding of the property by one from his co-tenant is not conversion,¹⁵ as one has as much right to the possession as the other.¹⁶

¹¹ *Hawley v. Clowes*, 2 Johns. Ch. 122.

¹² *Baily v. Hobson*, L. R. 5 Ch. App. 180.

¹³ *Turner v. Waldo*, 40 Vt. 51; *Gilbert v. Dickerson*, 7 Wend. 449; *White v. Brooks*, 43 N. H. 402; *Dain v. Cowing*, 22 Me. 347; *Williams v. Chadbourne*, 6 Cal. 559; *Bell v. Lyman*, 1 Mon. (Ky.) 39; *Arthur v. Gayle*, 38 Ala. 259; *Weld v. Oliver*, 21 Pick. 559; *Roston v. Morris*, 25 N. J. L. 173; *Burton v. Williams*, 5 B. & Ald. 395; *Perminter v. Kelley*, 18 Ala. 716; *Wheeler v. Wheeler*, 33 Me. 347; *Wilson v. Reed*, 3 John. 175; *Lowe v. Miller*, 3 Gratt. 205; *Dykeman v. Valiente*, 42 N. Y. 549; *Brightman v. Eddy*, 97 Mass. 478; *Munford v. McKay*, 8 Wend. 442; *Hull v. Page*, 4 Ga. 428.

¹⁴ *Fiquet v. Allison*, 12 Mich. 328; *Lobdell v. Stowell*, 51 N.Y. 70; *Benedict v. Howard*, 31 Barb. 571; *Agnew v. Johnson*, 17 Penn. St. 377; *Strickland v. Parker*, 54 Me. 263.

¹⁵ *Wilson v. Reed*, 3 Johns. 175.

¹⁶ *Wild v. Oliver*, 21 Pick. 559.

One tenant in common can lawfully convey a part of his undivided estate by specific bounds, but the courts claim that this point is attended with considerable difficulty, by reason of the injurious consequences of such sale to the co-tenant.¹⁷ The law upon this question was considered settled in Ohio.

One tenant in common has a right to take peaceable possession of the premises owned in common; and although such possession is acquired by stealth, yet, if without force or tumult, or a breach of the peace, it will not be illegal; but he has no right to oust or debar his co-tenant from joint possession.¹⁸ The court of appeals of New York have held, that where one of the tenants in common is in possession of the entire premises without agreement with, or objection on the part of his co-tenants, he is properly chargeable with the rent, and is not entitled to have the same apportioned.¹⁹ And if several tenants are in possession, the rent may be apportioned.

The law of the State of New York, that tenants in common must all join in an action of trespass to recover damages for injuries to real estate held in common, is not changed by the Code; and where a defect of parties is apparent upon the face of the complaint, it can be made available to the defendant only by demurrer.²⁰ Where title to lands is in several tenants in common, a joint action of ejectment cannot be maintained by two or more, less than the whole number; all must join in one action to recover the whole premises, or a separate

¹⁷ *White v. Sayre*, 2 Ohio, 110.

¹⁸ *Wood v. King*, 43 N. Y. 152; *Hyatt v. Wood*, 4 Johns. 150.

¹⁹ *Damainville v. Munn*, 32 N. Y. 197.

²⁰ *Dupuy v. Strong*, 3 Keyes, 603. See 33 N.Y. 43.

action must be brought by each to recover his share. If the consent of one or more to bring a joint action cannot be obtained, such persons refusing to consent should be made parties defendant to the action.²¹

An agreement for the occupation and working of a farm, and dividing the products and sharing the expenses, does not create the relation of landlord and tenant, but makes the parties to it tenants in common.²²

THE TRUSTEES OF A SCHOOL DISTRICT may lawfully acquire an interest in real estate for a school-house site, as tenants in common with others.²³ If they could not do so under the general school law, an act of the legislature legalizing the site selected and occupied by them, upon land held by several tenants in common, and authorizing them to acquire title thereto, followed by the purchase of an undivided interest therein, clothes them with the rights of tenants in common with the other owners, and as such, the district hold *an interest in* the land, and when in possession of such land, with other co-tenants, with a school-house thereon, such possession cannot lawfully be disturbed by a co-tenant; and, if such co-tenant enters by force and excludes such trustees, they may lawfully eject him therefrom, using such force as may be necessary; and the tenant so ousted cannot maintain an action for trespass, nor an action for forcible entry, for removing him.

²¹ Hasbrouck *v.* Valentine, 62 N. Y. 475. See 6 Hill, 634; 1 Pet. 73; 5 Cow. 188; 3 Wend. 149; 2 Cai. 169; 6 Barb. 132; 2 Hill, 526.

²² Wright *v.* Moshier, 16 How. Pr. 457; Taylor *v.* Bradley, 39 N. Y. 129.

²³ King *v.* Phillips, 1 Lans. 421.

A PRIVATE ASSOCIATION of individuals for the construction and operating of a telegraph line is not a partnership. The members are mere tenants in common of the property and franchise, and a majority cannot bind a minority of them unless by special agreement. The articles of association provided that the affairs of the association should be managed by three trustees. The court held that the trustees must be appointed by a majority of the stockholders.²⁴

AN ACCOUNTING may be had between the tenants in common. The law does not assume that one tenant can occupy the premises, and have the use, benefit and income thereof as his own, and deprive his co-tenants of the benefit of their respective shares ; but it also assumes that if one co-tenant is allowed by his fellow co-tenants to occupy the premises without any express agreement as to such occupancy, and he does nothing to prevent his co-tenants from occupying the premises with him, he is not liable to account to his co-tenants for the rental value thereof. The New York statute makes him only liable for what he receives over and above his just proportion.²⁵ One tenant in common may maintain an action for an accounting among his co-tenants, against those who have received more than their share of the rents and profits.²⁶ An action will lie for property sold from the land.²⁷

HUSBAND AND WIFE may be tenants in common. The statutes of New York^a make provision who are and

²⁴ *Van Aernam v. Phelps*, 9 Barb. 500.

²⁵ *Rcseboom v. Roseboom*, 15 Hun, 309.

²⁶ *Josylin v. Josylin*, 9 Hun, 388.

²⁷ *Wright v. Wright*, 59 How. Pr. 176.

^a Every estate granted or devised to two or more persons, in

who are not tenants in common. The statutes of 1860 concerning the rights and liabilities of husband and wife, has been construed by the courts, to the effect that where lands have been conveyed to a husband and wife jointly, without any statement in the deed as to the manner in which the grantees shall hold, they are tenants in common, and not tenants by entirety, and the grantee in conveyance by the wife of an undivided half of the premises, is entitled to a partition.²⁸ Judge Danforth, of the New York court of appeals, agrees with the views of the court in the case last cited.²⁹ In *Meeker v. Wright*, one Smith deeded land to Samuel Dailey and Cordelia Dailey, who were husband and wife. No statement was made in the deed as to the manner in which the grantees should hold the lands. Justice Danforth says: "Upon this state of facts, it is plain that the grantees became tenants in common of the premises, for the statute expressly declares that every estate granted to two or more persons shall be a tenancy in

their own right, shall be a tenancy in common, unless expressly declared to be in joint tenancy; but every estate vested in executors or trustees as such, shall be held by them in joint tenancy. This section shall apply as well to estates already created or vested, as to estates hereafter to be granted or devised. 3 R. S. 2179, § 44.

²⁸ *Zorntlein v. Bram*, 63 How. Pr. 240; citing 31 Barb. 314; 20 N. Y. 320; 15 Wend. 175; 1 Sand. Ch. 214; Hoff. Ch. 71; 5 Johns. Ch. 431; 9 Abb. Pr. N. S. 444; 16 Johns. 110; 8 Cow. 277; 3 Hun, 519; 76 N. Y. 162; chap. 472, N. Y. Laws 1880.

²⁹ *Meeker v. Wright*, 76 N. Y. 262; citing 7 Cow. 360; 13 N. Y. 509; 2 Id. 333; 31 Barb. 314; 62 Barb. 373; 17 How. Pr. 413; 23 N. Y. 529; 37 N. Y. 35; 53 N. Y. 93; 45 N. Y. 230; 47 N. Y. 577; 75 N. Y. 103; 14 N. Y. 430; 31 Barb. 313; 49 Barb. 162; 9 Abb. Pr. N. S. 444; 3 Hun, 519; 3 T. & C. 574; 2 Wilson, 254; 44 N. Y. 27; 7 Johns. Ch. 57; 15 Wend. 616; 19 Id. 175; 17 Johns. 548; 61 Barb. 475; chap. 90, Laws 1860. See 11 Hun, 533.

common, unless expressly declared to be a joint tenancy." Chapter 80 of New York Laws of 1860, upon this question says: "That the property, both real and personal, which comes to any married woman by grant, and the rents, issues and proceeds of all such property, shall, notwithstanding her marriage, be and remain her sole and separate property, and shall not be subject to the control or interference or her husband, or liable for his debts."^b

Thus it would seem, if we are to follow the views of DANFORTH, J., that in New York the statutes have changed the common-law rule, and that the husband or wife may maintain an action for partition against the other, although the proposition that the wife or husband may partition against the other does not appear to be fully settled in the mind of Judge DANFORTH. But in 1883 the New York court of appeals settled the question that the common-law doctrine has not been abrogated by the statutory provisions above referred to.³⁰ The reasoning of Judge DANFORTH seems to be clear in the premises, and there is not much doubt but what in time the better reasoning of Judge DANFORTH will be adopted as a statutory regulation, and the old common-law doctrine be abrogated. Judge

^b POSSESSION OF ONE, POSSESSION OF ALL. Trespass and trover. See 1 Hill, 234; 15 L. C. E. 113; 1 Lans. 246; 19 Barb. 665.

WHO ARE TENANTS IN COMMON. 2 Barb. 635; 15 Id. 335; 23 Cal. 521; 82 Ind. 334; 67 Mo. 173; 31 N. J. L. 554; 72 Penn. St. 551; 48 Am. Rep. 160; 94 Ind. 119; 51 Am. Dec. 178; 17 Ala. 362.

LEASE TO WORK, RELATION CREATED BY. 39 N. Y. 137; 9 Am. Rep. 303; 37 Conn. 44; 1 Lans. 246; 2 Id. 219. These questions are fully discussed in *Putnam v. Wise*, 1 Hill, 234; L. C. E. 113.

³⁰ *Bertles v. Nunan*, 92 N. Y. 152.

EARLE, in his opinion in *Bertles v. Nunan*, says in substance, that the common-law rule is based upon the unity of husband and wife, and that by that rule the husband was made responsible to society for his wife, and was responsible for her torts and frauds, and in some cases for her crimes. The judge seems to have ignored the fact that as the condition of society has improved, and civilization has advanced, the law-makers have from time to time bettered the business position of married women by giving them more rights and more powers, and abrogating the harsh and arbitrary powers which the common law granted to the husband over his wife's property. But the question seems to have been settled by the court of appeals that the law is, that husband and wife, under a conveyance to them jointly, take and hold the property not as tenants in common, but as tenants by entirety, and one cannot maintain an action of partition against the other.^o

JOINT TENANTS. Two or more persons to whom are granted lands or tenements, to hold in fee simple, fee tail, for life, for years, or at will, are joint tenants, and the estate which they thus hold is called an estate in joint tenancy. The tenants thereof must have one and the

^oON THE COMMON LAW DOCTRINE. See 49 Barb. 155; 15 Wend. 615; 18 Barb. 159; 1 Dana, 244; 7 Yerger, 319; 14 N. Y. 430; 5 Mass. 521; 6 Bush (Ky.) 199; 5 Wis. 102; 16 Vt. 309; 25 Mich. 347; 26 Ind. 428; 50 Miss. 531; 13 Me. 182; 1 Washburn on Real Property, 278; 1 Johns. Ch. 450; 17 Johns. 548; Roper on Husb. & W. 182; 18 N. Y. 265; 76 N. Y. 267; 23 N. Y. 529; 26 Ind. 428; 49 Md. 402; 1 How. U. S. 311; 96 U. S. 395; 20 N. Y. 320; 71 Penn. St. 81; 14 N. Y. 430; 76 N. Y. 262; 3 N. Y. Sup. Ct. (T. & C.) 574; 3 Hun, 519; 33 Am. Rep. 266; 29 Ark. 202; 50 Miss. 531.

same interest, arising by the same conveyance, commencing at the same time, and held by one and the same undivided possession. The principle incident to this estate is the right to survivorship, by which, upon the death of one joint tenant, the entire tenancy remains to the surviving co-tenant, and not to the heirs or other representatives of the deceased, the last survivor taking the whole estate. It is an estate that can only be created by the acts of the parties, and never by operation of law. The policy of American law is against survivorship, and in many States it is abolished by statute.^d

In Massachusetts the courts have held that where land is conveyed to two in a mortgage as collateral security for a joint debt, it is held by them in joint tenancy, notwithstanding the statute of 1795, and, upon the death of either mortgagee, the remedy to recover the debt would survive, and the survivor could recover.³¹

The presumption in most of the United States is, that all tenants holding jointly hold as tenants in common, unless clear intention to the contrary is shown.^e In some States this is regulated by statutes. Title by joint tenancy has been much reduced in extent in this country, and the incident of survivorship is almost entirely destroyed by statutes. There are exceptions, where such a tenancy is a necessity, and by reason of the necessity, the court is bound to recognize the doctrine of joint tenancy. For instance, in case of legacies, and in case of trustees and executors, joint tenancy is a necessity.

^d JOINT TENANCY. See 16 Gray, 308; 7 Mass. 131; 2 Blacks. Com. 179; 2 Cruise Dig. 48; 4 Kent, 358.

³¹ Appleton *v.* Boyd, 7 Mass. 131.

^e 6 Gray, 428; 5 Halst. 42; 2 Ala. N. S. 112; 1 Root, 148; 2 Ohio, 306; 10 Ohio, 1; 11 S. & R. 191; 3 Vt. 543; 3 Md. Ch. Dec. 547; 1 Greenl. Cruise Dig. 829; 1 Washb. R. P. 408.

At common law an estate in joint tenancy is where lands or tenements are granted to two or more persons to hold in fee simple, fee tail, for life, for years or at will.³² Each joint tenant has the entire possession of every parcel and the whole. It is a unity and entirety of interest. The interest being equal and similar, also one and the same, the survivor takes the whole. Joint tenants have one estate in the whole and no estate in any particular part. Two corporations cannot hold lands as joint tenants. Each being something that cannot die, there can be no survivorship.³³ Nor can a corporation hold lands as a joint tenant with a natural person. Infants may be joint tenants, and a child becomes at its birth a joint tenant with the mother of lands which the latter holds in special tail.³⁴ As a general rule co-trustees are joint tenants, and a conveyance to a trustee for the use and benefit of two or more persons vests the equitable estate in the *cestuis que trust* as joint tenants.³⁵ Each joint tenant is entitled to his share of the rents and profits as between his co-joint tenants during his life-time. This is, however, subject to the right of the survivor or survivors to take the whole estate at his death to the total exclusion of his heirs or personal representatives. One tenant cannot devise his property by will. The right of survivorship being the leading feature to make up a joint tenancy, at death nothing would remain to the estate of the deceased joint tenant; therefore the will would be inoperative and useless.

³² 4 Wait Actions & D. 169.

³³ De Wilt *v.* San Francisco, 2 Cal. 289.

³⁴ Powell *v.* Powell, 5 Bush (Ky.) 619.

³⁵ Webster *v.* Vanventer, 6 Gray, 428; Parsons *v.* Boyd, 20 Ala. 113; Greer *v.* Blancher, 40 Cal. 194.

so far as the same pertained to the estate in joint tenancy held by the testator in his life-time.³⁶ One joint tenant cannot bind his co-tenant, in a contract for the sale of the joint real estate, without express authority from the co-tenant, anterior to the contract, or a complete ratification of the contract afterwards by his said co-tenant.³⁷

Joint tenants must join in an action for the recovery of the possession of land jointly held, and the failure to do so is fatal to a recovery.³⁸ It is a common-law rule, that for any thing pertaining to land held in common, joint tenants and tenants in common should be sued jointly in trespass or trover, and if one only be sued he may plead the joint tenancy in abatement. Ejectment will lie between joint tenants in the case of actual ouster.³⁹

An alien and a citizen may be joint tenants: but the interest of the alien is subject to escheat.⁴⁰ The widow of a joint tenant is not entitled to dower. The survivor comes in by a paramount title, which he may allege that he obtained directly from the grantor without naming his companion.⁴¹

One joint tenant cannot charge or incumber the estate so as to bind the other who survives him.⁴² In

³⁶ 1 Washb. on Real Prop. 412; *Duncan v. Forser*, 6 Binn. (Penn.) 193.

³⁷ *Hanks v. Enloe*, 33 Tex. 624.

³⁸ 5 Bac. Abr. 299, Joint Ten. K; *Dewey v. Lamber*, 7 Cal. 347.

³⁹ *Peaceable v. Reed*, 1 East, 568; *Bethel v. McCool*, 46 Ind. 303; *Halford v. Tetherow*, 2 Jones (N.C.) 393; *Noble v. McFarland*, 51 Ill. 226.

⁴⁰ Coke Lit. 180.

⁴¹ American Law Real Prop. 786.

⁴² Id. 787.

Connecticut one joint tenant may charge his share with his private debts.⁴³

The common-law rule that no title to dower attaches on a joint *seizin*, on account of the mere possibility that the estate may be by survivorship, does not prevail in North Carolina, South Carolina, Indiana or Kentucky, or probably any other States where the *jus accrescendi* or the right of survivorship has been abolished.⁴⁴

TENANTS BY ENTIRETY. In common law, the husband and wife are considered as one person, and can not take by moieties, as joint tenants, each an undivided moiety of the whole, but upon a conveyance to them, each has the entirety. They are seized *per tout* and not *per my*. And the husband can neither forfeit or alien the estate so as to bind the wife after his death.⁴⁵

In Massachusetts, it has been held that tenancy by entireties is essentially a joint tenancy as modified by the common law doctrine that husband and wife are one person, and not changed by the statutes enacting that "conveyances and devises of land made to two or more shall be construed to create estates in common and not in joint tenancy." Statutes enacted to enable married women to take and hold property to their sole and separate use do not in terms apply to an estate granted to husband and wife which conveys common law rights incapable of severance; and, construing the different provisions of the statutes in relation to husband and wife

⁴³ Remington *v.* Cady, 10 Conn. 44.

⁴⁴ Lit. § 45; Ind. L. 183, p. 290; Reed *v.* Kennedy, 2 Stroh. 67; Wier *v.* Fate, 4 Ired. 264; 3 Blackf. 133; Davis *v.* Logan, 9 Dana, 186; 4 Kent, 37; Maybury *v.* Brien, 15 Pet. 21. See 4 Eng. 9.

⁴⁵ 1 American Law Real Prop. 785.

and conveyances by married women with reference to each other, it is clear the Legislature intended that this peculiar tenancy by entireties should be preserved as it existed at common law.⁴⁶

The general rule in respect to the interest of partners in lands purchased for, and appropriated to, partnership purposes and paid for with partnership funds is well settled. Such lands are partnership assets. This is so, even if the title is taken in the individual names of the persons composing the firm. The legal effect of the deed is to create the individuals tenants in common of the lands. Parol proof is admissible to show that the lands were purchased for partnership purposes, and paid for with partnership funds. In that case, the lands are partnership assets, and pass to the survivor as personal property would, charged with the liability of partnership property to pay the partnership debts.⁴⁷

⁴⁶ *Pray v. Stevens*, 1 N. Eng. R. 521; citing 13 Allen, 215; 108 Mass. 254; 8 Ch. App. Cases, 192; 5 Mass. 522; 110 Mass. 273; 27 Ch. Div. 166; 92 N. Y. 152; 49 Md. 402; 57 Ind. 412; 42 Miss. 1; 64 Penn. St. 39; 56 Penn. St. 106; 25 Mich. 347; 29 Ark. 202; 50 Miss. 531; 1 Dana, 242; 5 Halst. 42; 76 Ill. 57; 28 Iowa, 302; 56 N. H. 105; 34 N. J. L. 18; 15 Wend. 175; 5 Jones (N. C.) L. 357; 1 Burr. 176; 6 Ir. C. L. 367-375; 1 Spencer, 556; 4 Sneed, 683.

Also see 12 Wend. 421; 37 Ind. 398; 19 Wis. 365; 1 Hi. 569; Hoff, 77; 1 Sandf. Ch. 222; 10 N. Y. 545; 76 N. Y. 272; 3 Hun, 520; 11 Hun, 535; 31 Barb. 320; 49 Barb. 162; 5 T. & C. 569; 6 How. Pr. 234; 45 Am. Dec. 390; 27 Am. Rep. 308; 65 Mo. 679; 9 Abb. Pr. 447; 4 Bos. 294; 37 Ind. 400; 11 Conn. 337; 3 Hamm. 305; 16 Johns. 115; 8 Cow. 283; 15 Wend. 615; 5 N. H. 416; 2 Cow. 439; 3 Rand. 179; 12 East, 57; 10 Johns. 49; 4 Bibb, 241.

⁴⁷ *Leary v. Boggs*, 1 N. Y. S. Rep. 571, citing 24 N. Y. 505; 49 Id. 47; 64 Id. 471.

CHAPTER III.

WHO MAY PARTITION. PARTIES.

GENERAL PRINCIPLES. The principles and policy of the law is that estates held in joint tenancy, in common, or by co-parceners can be partitioned among those having an interest in them. In Connecticut joint tenants, tenants in common and co-parceners may be compelled to partition by writ.¹ And in New Jersey by writ as at common law, and by bill in chancery and by commissioners duly appointed.² Under the New York statute the proceedings in partition cannot be instituted but by a party who has an estate entitling him to immediate possession.³ If such a disability exist it should as a defense be set up in the answer, but if there has been an omission to plead it, it may be taken advantage of at the trial under the plea of *non tenant insimul*. This is provided for by section 1532^a of the New York

¹ Statutes 1838, p. 392.

² N. J. R. S. 1847.

³ Brownell *v.* Brownell, 19 Wend. 367; citing 9 Cow. 561-573.

* 1532. Where two or more persons hold and are in possession of real property, as joint tenants or as tenants in common, in which either of them has an estate of inheritance, or for life or for years, any one or more of them may maintain an action for the partition of the property, according to the respective rights of the persons interested therein: and for a sale thereof, if it appears that a partition thereof cannot be made without great prejudice to the owners.

Code of Civil Procedure. A *cestui que trust* cannot maintain an action for the partition of real estate, and a purchaser at a sale, had under a judgment therein, cannot be made to complete his purchase, even though the trustees were made parties defendant.⁴ An estate vested in trustees will remain inviolate, and the person for whom the trust is held is entitled to enforce the performance of the trust.

A remainderman or a reversioner may be made party defendant in an action for partition. He cannot institute the action, at least against others not seized of a like estate in common with them. The right is only given to one having actual or constructive possession of the lands sought to be partitioned. A remainderman has neither.⁵

Possession of premises so as to allow the bringing of an action of partition is presumed from the allegation of the complaint that the parties are seized as tenants in common, and it has been quite well settled that the seizin of one tenant in common, who does not deny the title of his co-tenant, is the seizin of all; and, where there is no adverse possession, the entry of one co-tenant is the possession of all. The possession of one is the possession of all, and constructive possession is sufficient to constitute the unity of the right of possession required in a tenancy in common.⁶

⁴ *Harris v. Larkins*, 22 Hun, 488; citing 70 N. Y. 136; 56 N. Y. 226; 37 N. Y. 59; 17 N. Y. 210; 15 N. Y. 617.

⁵ *Sullivan v. Sullivan*, 66 N. Y. 37, reversing 4 Hun, 198; citing Litt. R. 300; 19 Wend. 367; 9 Cow. 530; 2 Barb. Ch. 398; 46 N. Y. 184; 59 Id. 426; 15 Id. 617; 2 Kern. 519; 2 Blacks. Com. 161; 11 Vt. 129.

⁶ *Jenkins v. Van Schaack*, 3 Paige, 242; *Burnhans v. Burnhans*, 2 Barb. Ch. 398; *Shumway v. Holbrook*, 1 Pick. 114; *Thomas v. Hatch*, 3 Sum. 170; *Putnam v. Ritche*, 6 Paige, 398.

To maintain an action for the partition of lands, the plaintiff must have either actual or constructive possession, in common with his co-tenants. A subsisting adverse possession is an absolute bar. The possession of one of several tenants in common may become adverse, when his acts amount to an exclusion of his co-tenants, and until the excluded parties in a lawful way regain their possession, a partition cannot be had.⁷ The common law rule was: "If one coparcener disseized another, during the disseizin a writ of partition would not lie between them."⁸ Possession usually follows the legal title when no adverse possession is shown.⁹ Possession is presumed to follow title.

The wife must be made a party. She has an inchoate right of dower in the lands owned by her husband, and she must be either plaintiff or defendant in the action. The court, before it will order a sale of land in partition, requires that all those that have an interest in them shall be made parties to the action, to the end that the purchaser may get a perfect title. Hence the wives of those entitled to the land should be made parties.¹⁰

Statutes have been enacted in most States governing partition cases. There are a great variety of cases in which a court of equity must step in and supply the defects or omissions of the statutes. Many of the questions are complicated, as to the easements, enjoyment,

⁷ *Florence v. Hopkins*, 46 N. Y. 182, citing 9 Cow. 530; 19 Wend. 369; 14 N. Y. 235; Hoff. 560.

ADVERSE POSSESSION. 12 Wend. 602; 9 Id. 512; 22 N. Y. 170; 4 Wend. 558; 20 N. Y. 400; 20 Id. 147; 26 Id. 338; 4 Mason, 534.

⁸ *Coke Litt.* 167, b; 16 *Viner*, 225, *Partition*, 1.

⁹ *Beebe v. Griffing*, 14 N. Y. 235; see 5 *Denio*, 385; *Deady*, 365; 22 *Mich.* 65.

¹⁰ *Knapp v. Hungerford*, 7 *Hun*, 588.

constructive possession, and antagonistic claims, where, notwithstanding the statutes, the interposition of a court of equity is indispensable to the proper adjustment of the rights of the parties.

In Massachusetts and Maine the writ of partition at common law is not only given, but partition may be effected without writ.¹¹ The petition in Massachusetts may be addressed to the court of common pleas, or the supreme judicial court. The probate court may also award partition as between heirs and devisees. In Connecticut, New Jersey, Ohio, Illinois, and Georgia, and in probably most of the other States, partition of lands in joint tenancy, tenancy in common, or coparcency, may be effected by petition to the courts at law. In Connecticut, the court of probate has jurisdiction to order partition in the case of minors, for reasonable cause.¹² In Indiana courts of law and courts of equity have concurrent jurisdiction in partition.¹³ A very easy mode of partition has been established in Missouri, by petition to the circuit court.¹⁴ New Jersey, in 1797, embodied the substance of the English statutes of 31 & 32 Hen. VIII. It was the ancient doctrine, under the statutes of Henry VIII., that no persons could be made parties to a writ of partition, or be affected by it, but such as were entitled to the present possession of their shares in severalty; they must be joint tenants, or tenants in common in their own or their wives' right, or tenants for life or years.¹⁵

¹¹ *Mussey v. Sanborn*, 15 Mass. 155; *Cook v. Allen*, 2 Id. 462; *Act Maine*, 1821.

¹² *Statutes of Conn*, 1838, pp. 331-392; *Statutes of Ohio*, 1831, p. 254; *R. L. Ill.* 1833; *Prince's Digest Statutes of Georgia*, 1837, p. 451.

¹³ *Ind. Statutes*, 1831.

¹⁴ *Mo. R. S.* 1835.

¹⁵ *Stevens v. Enders*, 1 *Green*, 271.

PARTITION OF PERSONAL PROPERTY. The partition of personal property is unknown at common law, but a bill in equity may be maintained for that purpose.¹⁶ Adverse possession is a bar to the bill.¹⁷ When, however, in a suit for partition of personal property, the defendant denies that the plaintiff is a tenant in common, and sets up a title to the property in himself, in severalty, the plaintiff is not obliged to establish his title by action at law, but the title may be tried in the partition suit.¹⁸ A court of equity may distribute among the heirs at law their respective shares of an estate.¹⁹

WHO MAY CLAIM PARTITION. Tenants in common and joint tenants have an absolute right to the division of land held by them in common or in joint tenancy, and, if a partition cannot be had, to a sale and division of the proceeds. The general doctrine respecting partition is that a tenant in common of the inheritance may maintain partition, notwithstanding a particular estate is still outstanding. Partition as aforesaid is a matter of right by the common law, as well as by the statute. Where both or either of the parties will not consent to hold and use the property in common, and where a sale is for the best interest of all parties concerned, a sale will be had and the proceeds divided.²⁰

¹⁶ *Marshall v. Crow*, 29 Ala. 278; *Irvin v. Kind*, 6 Ired. 219; *Steedman v. Weeks*, 2 Stroh. Eq. 145; *Savage v. Williams*, 15 La. 250.

¹⁷ *Drew v. Clemens*, 2 Jones, 212.

¹⁸ *Smith v. Dunn*, 27 Ala. 315.

¹⁹ *Bethen v. McCall*, 5 Ala. 308; *Vanderveer v. Alsten*, 16 Id. 494.

²⁰ *Smith v. Smith*, 10 Paige, 470; *Potter v. Wheeler*, 13 Mass. 504; *Scovil v. Kennedy*, 14 Conn. 349; *Bradshaw v. Callaghan*, 8 Johns. 558; *Holmes v. Holmes*, 2 Jones Eq. 334; *Campbell v.*

Where lands leased for a term of years are owned by several persons as tenants in common both of the rents and of the reversion, a bill for partition may be sustained; but a sale of the lands, under the decree in partition, must be made subject to the rights of lessees, who will then become the tenants to the purchaser of the rents and reversion.²¹ A partition may be obtained by an assignee under the general assignment act,²² or by a tenant by the courtesy,²³ or by a devisee of a life estate.²⁴ In one case it was decreed, where plaintiff was an owner in fee of an undivided share of mines and minerals on and in the premises with power to go on the land and work such mines, and defendant was the owner in fee of the residue of the estate and interest in the premises, a partition could be had.²⁵ A trustee of lands under a trust to receive the rents and profits and apply them to the use and support of an infant during its minority, with absolute power in the trusteeship to sell the lands and invest the proceeds, may maintain an

Love, 9 Md. 500; *Higgenbottom v. Short*, 25 Miss. 160. See *Co. Litt.* 131; *Stat.* 31 *Hen.* VIII.; 1 *Salk.* 312; 4 *Burr.* 2021; 9 *Cow.* 530; 15 *Johns.* 319; 5 *Id.* 80; 9 *Cow.* 565; 1 *Sand. Ch.* 200; 1 *Barb.* 564; 2 *N. Y. Leg. Obs.* 408; 12 *Johns.* 434; 5 *Wend.* 341; 16 *Id.* 52; 6 *N. Y.* 89; 4 *Rob.* 606; 38 *Ind.* 428; 7 *Lans.* 196; 4 *Hun.* 199; 36 *N. Y.* 499; 4 *Id.* 257; 47 *Id.* 467; 73 *Id.* 355; 34 *Id.* 536; 3 *Fairf.* 146; 8 *Ves.* 143; 13 *Pick.* 236; 1 *Aikens.* 67; 5 *N. H.* 134; 2 *Blant Amb.* 589; 1 *P. Wms.* 446; 3 *Younge & C.* 540; 10 *Conn.* 44; 4 *Kent.* 364; 2 *Atk.* 380; 2 *Vern.* 232; 24 *Conn.* 230; 1 *Hoff. Ch.* 21; 9 *Cow.* 569; 22 *Wend.* 498; 7 *Paige.* 386; *Preston on Estates*, 1, 138; 46 *N. Y.* 184; 59 *Id.* 426.

²¹ *Woodworth v. Campbell*, 5 *Paige.* 518.

²² *Van Arsdale v. Drake*, 2 *Barb.* 599.

²³ *Riker v. Darker*, 4 *Edw.* 688.

²⁴ *Ackley v. Dygert*, 33 *Barb.* 176.

²⁵ *Canfield v. Ford*, 16 *How. Pr.* 473; 28 *Barb.* 336.

action for partition.²⁶ And a tenant in common, who is also trustee in part for the others, may sue for partition.²⁷

Where an administrator advances from his own funds money to complete the purchase of land made by his intestate, and takes the title in his own name as security for the money so advanced by him, an action of partition, to which he and the heirs and widow are parties, is maintainable.²⁸ And an heir of a deceased intestate can maintain an action for partition, notwithstanding an agreement, signed by herself and the other heirs and widow, to abide by and consent to the provisions of an unexecuted will. Such agreement being void, there being no consideration.²⁹ Where an estate in fee of one undivided half of certain premises, and a life estate in the other undivided half of the same, with remainder over in fee to the heirs of the devisee of the life estate, are united in the same person, who conveys the same, in fee, in parcels, from time to time, expressly excepting the prior from the operation of the subsequent conveyance: upon application, after the decease of the devisee for life, of one of the remaindermen of the life estate for a partition of the estate, according to the terms of the devise, effect will be given to the earlier as against the latter conveyances, so as to secure to the holders under the former, so far as practicable, their titles in fee. And where, in such case, a partition is found impracticable, and a sale is decreed, the lands must be sold in the

²⁶ *Gallie v. Eagle*, 65 Barb. 583.

²⁷ *Cheesman v. Thorn*, 1 Edw. 629.

²⁸ *Herbert v. Smith*, 6 Lans. 493.

²⁹ *Elderkin v. Rowell*, 42 How. 330; citing 1 Wait, 86; 40 How. Pr. 452; 1 N. Y. 581; 2 Barb. 420; 10 Id. 308; 12 Barb. 685; 13 Johns. 257; 24 Wend. 97; 12 Johns. 190; 7 Barb. 590; Story Cont. § 429; Pars. Cont. 357; 18 Johns. 145; 3 N. Y. 93.

inverse order of alienation, and the proceeds of the sale must be distributed to the remaindermen, after the life estate, and their grantees, upon the basis of the actual value of the whole premises (exclusive of buildings), and not upon an assumed equality in the value of the unsold portions. There must be actual or constructive possession upon the part of the plaintiff before he can maintain an action of partition, and a knowledge of all the facts out of which legal or equitable rights arise in favor of another, is a full knowledge of those rights.³⁰

Where one has a present interest *per autre vie*, in an undivided portion of lands, and a contingent remainder in fee in an undivided part, he is entitled to a partition; and, if actual partition or division of the lands cannot be had under the rules, it should be sold and the proceeds divided. Under the New York statutes, all persons having an estate, present or future, vested or contingent, should be made parties.³¹

When it is practicable and for the best interest of all concerned, the land should be divided, and any co-tenant may claim an actual partition or division of the land.³² Land left by will to two or more persons, upon condition that it shall be improved, is subject to partition, and any owner may bring the action; the division of the

³⁰ *Warfield v. Crane*, 4 Keyes, 448; citing 14 Johns. 354; 9 Cow. 530; 1 Johns. Ch. 111; 4 Wend. 277; 2 Harg. & Johns. 431; 364; 3 Denio, 485; 3 Hill, 165; 2 Johns. Cas. 384; 2 Denio, 336; 4 Johns. Ch. 271; 5 Barb. 51; 3 Barb. Ch. 608; 3 Paige, 470, 545; 17 N. Y. 125; 18 Id. 575; 24 Id. 517; 22 Id. 425; 26 How. Pr. 170; 16 Abb. Pr. 413; 37 Barb. 97; 27 Id. 187; 15 How. Pr. 14; 36 N. Y. 561; 34 Id. 383.

³¹ *Brevart v. Dorothea*, 70 N. Y. 136; citing 10 Paige, 473; 6 Sim. 643; 17 Ves. 533; 2 N. Y. 19; 15 Id. 617; 56 Id. 226; 1 Edw. Ch. 629; 17 N.Y. 210; 37 Id. 59; 7 Paige, 544. See 4 Ala. 475.

³² *Lucas v. Peters*, 45 Ind. 313.

ownership or fee does not affect the right to improve the land in common.³³

The wife having an inchoate right of dower must be joined with her husband as plaintiff.³⁴ A tenant by the courtesy initiate may maintain an action of partition.³⁵ A guardian of a minor who is a tenant in common may maintain an action of partition.³⁶ When suit for partition is brought by a committee of a habitual drunkard, or of a lunatic, the lunatic or drunkard should be joined as plaintiff.³⁷ A person who has a written contract with a tenant in common of real estate, for the purchase of his undivided share, and has paid a portion of the purchase money, has an equitable estate which entitles him to an action for partition.³⁸ A purchaser of an interest of a devisee has the same right.³⁹ So may the grantee of a widow's right of dower maintain the action.⁴⁰ Where one tenant conveys to another his undivided interest in the estate, retaining the life use of the premises, the grantee cannot partition.⁴¹ It has been held that one partner could maintain an action of partition of the partnership lands, against the others, though the terms of the partnership had not been fulfilled.⁴² The heirs of a deceased person, in case they have not parted with their interest in the estate, are the proper parties to a suit

³³ Richardson *v.* Merrill, 21 Me. 47.

³⁴ Repple *v.* Gilbor, 8 How. Pr. 456.

³⁵ Riker *v.* Darker, 4 Edw. Ch. 668.

³⁶ Zirkle *v.* McCue, 26 Gratt. 517. See 24 Mo. 252; 27 Id. 302; 4 Sandf. Ch. 508.

³⁷ Gorham *v.* Gorham, 3 Barb. Ch. 24.

³⁸ Langwell *v.* Bently, 23 Penn. St. 99.

³⁹ Stewart's Appeal, 56 Penn. St. 241. See 18 Cal. 96.

⁴⁰ Morgan *v.* Staley, 11 Ohio, 389.

⁴¹ Nichols *v.* Nichols, 28 Vt. 228.

⁴² Collins *v.* Dickinson, 1 Hayw. 240.

for the partition of real property.⁴³ Although a tenant for life may not maintain partition, because not a joint tenant or tenant in common with the remainderman, yet the defect is not jurisdictional, and a decree of sale in such an action is not absolutely void. It may only be corrected on appeal, and the sale is good as against those made parties to the action.⁴⁴ This seems to be an exception to the general rule, which is that the plaintiff must be a tenant in common or a joint tenant and that he must have an interest in all the lands sought to be partitioned.⁴⁵ Section 451 of the New York Code applies to actions of partition.⁴⁶

A remainderman is one who is entitled to the remainder of the estate after a particular estate carved out of it has expired.⁴⁷ As for instance, one leaves his estate to his widow to have and to hold during her natural life, and at her death to his children. After the life estate has been taken out, the children have the remainder, and they are tenants in common, or joint tenants, as the case may be, in such remainder, and they can petition among themselves as tenants in common or joint tenants of such remainder, but in most States they cannot disturb, and the courts will protect the life-estate.

A reversion is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. The

⁴³ *Van Werwerker v. Van Derwerker*, 7 Barb. 24.

⁴⁴ *Cromwell v. Hull*, 97 N. Y. 209; citing 15 N. Y. 617; 56 Id. 226; 66 Id. 40. See 22 Hun, 488; 15 Johns. 319; 46 N. Y. 182; 63 Id. 276; 70 Id. 254; 13 Week. Dig. 150.

⁴⁵ *Manolt v. Brush*, 3 Law Bull. 66; 19 Daily Reg. No. 137.

⁴⁶ *Bergen v. Wyckoff*, 84 N. Y. 659. See 11 Week. Dig. 295; 61 How. Pr. 149.

⁴⁷ *Bouv. Law Dict.* 532.

return of land to the grantor and his heirs after the grant is over. The reversion is a vested interest or estate, and arises by operation of law only. In this latter respect, it differs from a remainder, which can never arise except by will or deed. Some of the incidents attached to reversion were derived from the feudal constitution. The return of the estate is a feudal principle. The reversion arises by the operation of the law, and it is a vested interest or estate, inasmuch as the person entitled to it has a fixed right of future enjoyment. It may be conveyed, either in whole or in part. One learned jurist says: "It is more usual to pass a reversion by lease and release or bargain and sale."⁴⁷

The practice of hiring land for a limited time and paying rent to the owner of the soil, was known in the Roman law, but was regulated in the Hindoo code, as one of the incidents to a reversion.

The disseizin of the tenant of a particular estate, and occupation under it, however long continued, will effect the right of the reversioner.⁴⁸ Even where a tenant for life attempts to convey the estate in fee adverse possession does not commence until the death of such life-tenant.⁴⁹ If the tenant, during his term, remove and take away from the freehold any part thereof which he is not entitled to remove, the owner of the reversionary interest may sustain an action for injury to his interest.⁵⁰

⁴⁴ 2 Preston on Abst. 85.

⁴⁵ Jackson *v.* Shoemaker, 4 Johns. 390. See 6 Cush. 34; 29 Mo. 176.

⁴⁶ Gernet *v.* Lynn, 31 Penn. St. 94.

⁴⁷ On general principles of reversion, see 4 Mees. & W. 409; 19 Penn. St. 71; 7 Ired. (N. C.) Eq. 296; 16 Ves. 173; 53 Ind. 130; Co. Litt. 142; 4 Kent, 354; Gentoo Code by Holhed, 153; Litt. §§ 567, 568; 7 C. & B. 243; Cruise Digest, tit. 28, c. 1, § 65; 1 T. & R. 378; 3 Met. 76; 1 Salk. 384; 2 Wils. 49; 4 Mod. 1; 4 Bro. P.

There has been a conflict as to the construction of former statutes in New York relative to the remainderman and reversioner, but the York Code, by section 1533,^a settles all conflict of law, and of the construction of the law upon that subject. In a partition between tenants in common of a vested remainder or reversion, if it appears that an actual partition can not be had without great prejudice, the court must direct that the complaint be dismissed. If the owner of the prior estate should consent, it is doubtful if the court would then have jurisdiction to direct a division of the land. It certainly could not do so if there were infant parties to the action and the value of the prior owner's estate could not be accurately determined.⁶¹

A remainderman cannot compel present partition and sale of real estate, while the life tenant is living; he must

C. 594; 125 Mass. 157; 2 Blacks. Com. 175; 1 Washb. R. P. 37, 47; 25 Wend. 456; 8 Paige, 392; 5 Duer, 494; 35 N. Y. 393; 12 How. Pr. 1; 1 Abb. Pr. 466; 13 Wend. 608; 6 Rob. 544; 2 Hilt. 4; 19 Barb. 145; 27 Id. 104. On remainders, see 2 Johns. 288; 4 Id. 61; 10 Id. 12; 16 Id. 537; 5 Cow. 371; 8 Id. 543; 2 Hill, 554; 2 Den. 9; 2 Edw. 231; 7 Paige 70; 10 Hun, 328; 39 Barb. 386; 1 N. Y. 491; 41 Id. 66; 43 Id. 303; 50 Id. 161; 61 Id. 638; 4 Keyes, 569; 38 How. Pr. 483; 8 Abb. Pr. N. S. 37; 4 Abb. App. Dec. 108; 2 Abb. N. Cas. 404; 1 Redf. 392; 3 T. & C. 557; 67 N. Y. 133.

^a § 1533. ID.; BY REMAINDERMAN. Where two or more persons hold, as joint tenants or as tenants in common, a vested remainder or reversion, any one or more of them may maintain an action for a partition of the real property to which it attaches, according to their respective shares therein, subject to the interest of the person holding the particular estate therein. But in such an action the property cannot be sold, and if it appears, in any stage thereof, that partition cannot be made, without great prejudice to the owners, the complaint must be dismissed. Such a dismissal does not affect the right of any party to bring a new action, after the determination of the particular estate. See 19 Wend. 367; 66 N. Y. 37; 15 Id. 617; 7 Lans. 193; 3 N. Y. 355.

⁶¹ Scheu *v.* Lehning, 31 Hun, 183; citing 86 N. Y. 580; 77 Id. 518.

have the assent of the life tenant to entitle him to the remedy. There must be an estate in possession.⁵²

Tenants for life in possession may have partition as between themselves and all persons entitled to the reversion or remainder; and all who may be, or who may become entitled to any beneficial interests in the lands, may be made parties to the action or proceedings. A judgment in partition is conclusive on all having any interest who are made parties.⁵³

Between tenants in common partition is, in equity, a matter of right and not of discretion, whenever either of them will not hold or use the property in common. Courts of equity have concurrent jurisdiction with courts of law in all cases of the partition of lands among tenants in common. Legal and clear title must be shown by the complainant.⁵⁴

Where an undivided moiety of lands was vested in A, B and C as trustees of a settlement which expressly authorized a partition, and the other moiety was vested

⁵² *Hughes v. Hughes*, 63 How. Pr. 408; citing 15 N. Y. 617; 56 N. Y. 225; 66 Id. 37; 85 N. Y. 57; also see 11 Abb. N. C. 37; 30 Hun, 349; 2 McCarthy C. P. 100; 2 Browne C. P. 139.

⁵³ *Jenkins v. Fahey*, 73 N. Y. 355; citing 53 N. Y. 233; 1 Paige, 244; 5 Id. 235; 6 Hill, 415; 13 Barb. 50; 2 Hill, 380; 3 Kent Com. 401; 2 Cow. 497; 4 Mas. 467; 2 Den. 9; 1 N. Y. 491; 4 Hill, 92, 67 N. Y. 533.

⁵⁴ *Nash v. Simpson*, 1 New Eng. R. 699; citing 100 Mass. 341; 1 Wash. Prop. 78; 75 Me. 512; 3 Allen, 364; 68 Me. 137; 72 Me. 146; 128 Mass. 575; 52 N. H. 267; 1 New Eng. R. 20; 76 Me. 527; 8 Met. 424, 430; 68 Me. 135; 113 Mass. 197, 199; 17 Ves. 533; 12 Maine, 142; 35 Id. 107; 50 Id. 253; 62 Id. 112; 33 Vt. 195; 1 Story Eq. § 655; 2 Atk. 380; Amb. 236; 4 Rand. 74; 1 Johns. Ch. 111; 3 Id. 302; 3 Ired. Eq. 209; 3 Rand. 361; 13 Ill. 95; 54 Am. Dec. 427; 1 Green Ch. 384; 60 Barb. 178; 71 Mo. 100; 14 Tex. 69; 28 Id. 383-413; 106 U. S. 679, 690; 3 Cliff. 523; 100 U. S. 564; 102 Id. 647, 649; U. S. R. S. § 5057.

in D, E and F as trustees of a settlement, with power to sell, dispose of, convey, and assign the said hereditaments for such a price in money, or for such an equivalent or recompense in lands and hereditaments as to the trustees should seem reasonable, and for that purpose to revoke the old uses and to limit other uses and trusts, and a partition deed, purporting to be in exercise of the said powers, was executed by the trustees of the two moieties, D, E and F had power to partition, and partition between any number of persons might properly be effected under similar power.⁵⁵

⁵⁵ *Frith v. Osborne*, 18 Moak Eng. 724; citing *Shep. Touch.* 292; 4 Bro. C. C. 278; 11 Ves. 467, 2 Ex. 752; 1 Madd. 214; 3 Drew, 534; 2 Jur. N. S. 247; 16 Beav. 223; 6 Jarm. Conv. 594.

CHAPTER IV.

WHEN PARTITION CANNOT BE MAINTAINED.

A PARTY who has merely a future contingent interest in an undivided share of real estate cannot maintain a suit for a partition of the property. A mere reversioner, without the concurrence of any of the owners of the present interest in the premises, has no right to file a bill for partition, but a reversioner is a necessary party, where a bill is filed by a person who is owner of an undivided share of the reversion as well as of an undivided share of the present interest in the property.

The reversioner is also a necessary party, where the suit is brought by the owner of an undivided share. It is necessary that the reversioner be made a party, that the title to the property shall be free from liens and claims in case of sale, or that a proper adjudication of his interest may be had.¹ This rule has since been followed by the New York court of appeals.² A widow having a right of dower in land, is not a tenant in common with the owner or owners of the land, she cannot be the sole

¹ *Striker v. Mott*, 2 *Paige*, 387.

² *Smith v. Shultz*, 68 N. Y. 53; citing 2 *Id.* 19. On the construction of the word "heirs" in a will. 28 N. Y. 93; 53 *Id.* 233; 1 *Butler Fearne* (Lond. Ed.) 1844; 38 N. Y. 410; 3 *Lev.* 70; 2 *Pick.* 243; 108 *Mass.* 567.

plaintiff or defendant in an action of partition. The controlling principle of joint tenants and tenants in common does not exist, and there *must* be a suit between those whose relationship to each other is either that of joint tenant or tenant in common. They cannot all be plaintiffs or all defendants. The widow is a tenant in dower.³ The widow has no estate in the land, and, after quarantine, no right of possession: what she is to have is unknown until it has been admeasured and assigned to her, she cannot maintain partition.⁴

Where a lessee of land becomes a purchaser of an undivided moiety of the rent and reversion, the lease and the rent, as to the portion so purchased by him, is merged and extinguished, and he is not such a tenant in common (within the meaning of the statute) of the rent and reversion with the owner of the other half thereof as to entitle the latter to a partition. A tenant in fee and his landlord, though the tenant has acquired a moiety of the rent and reversion, cannot maintain an action of partition.⁵

Where the parties own separate parcels, and are not in possession of any portion of the land, either as joint tenants or tenants in common, a partition cannot be had.⁶ Nor can one of several partners, pending an action for a dissolution of the partnership and an accounting as to the same property, bring an action of partition.

Where land is deeded to husband and wife, and the

³ *Woods v. Clute*, 1 Sandf. Ch. 199; citing 7 Johns. 247; 8 Id. 558; 10 Wend. 414; 17 Ves. 552; 1 Kent & R. 42; 2 Paige, 389; *Payne v. Becker*, 22 Hun, 28; citing 1 Barb. 506; 10 Wend. 414; 13 Id. 533. See 5 Johns. 80.

⁴ *Lansing v. Pine*, 4 Paige, 639.

⁵ *Boyd v. Dowie*, 65 Barb. 237.

⁶ *Danvers v. Dorrity*, 14 Abb. Pr. 206.

deed does not state how they are to hold and enjoy it, that is, not indicating that they are to hold the same as joint tenants or tenants in common, the common-law rule is not abrogated by any of the New York statutes, they hold by entirety and cannot partition.⁷ This reverses the doctrine laid down in 63 Howard, 240, in the same case, and the views of Judge Danforth referred to under the head of Co-tenancy, and is also in accordance with the doctrine in *Bertles v. Nunan*, 92 N. Y. 152, and appears to fully settle the law in this state, upon the tenancy of husband and wife where they own lands together.⁸

Justice RAPALLO says, "The common-law rule, that when land is conveyed to husband and wife, they do not take as tenants in common, or as joint tenants, but each becomes seized of the entirety, *per tout* and not *per my*, and that on the death of either, the whole survives to the other," was held to be still the law in New York State.

Partition can not be ordered when it involves an infant's real estate, and there is a will forbidding the sale.⁹ Such a sale would be utterly void, and passes no title to the purchaser.¹⁰

Where five persons, acting as a committee to build sheds for the convenience of certain persons (themselves included), in the habit of attending a church, have

⁷ *Zorntlein v. Bram*, 100 N. Y. 12; 9 Abb. Pr. N. S. 444.

⁸ *Supra*, "Co-tenancy." Cases holding otherwise, see 9 Am. R. 679; 31 Ind. 181; 50 Miss. 103; 50 Ala. 182; 9 Kan. 466; 7 N. Y. Week. Dig. 15; 76 N. Y. 262.

⁹ *Muller v. Struppman*, 55 How. Pr. 521; citing 46 N. Y. 236; 14 N. Y. Supm. Ct. 151; 6 Hill 415; 15 N. Y. 617; 62 Id. 628; 5 Sand. 363; 52 Barb. 412.

¹⁰ *Rogers v. Dell*, 6 Hill, 415; citing 2 Ves. 23. See 73 N. Y. 361; 96 Id. 263; 8 How. U. S. 542; 74 Ill. 154.

received the conveyance of the premises on which it is proposed to build, and subsequently entered into a written agreement with others, by which they are empowered, as such committee, to make the erections at the joint expense of all the subscribers, each subscriber to pay an equal share of the expense of the improvement "upon completion thereof and the delivery of a proper title for each respective share thereof," the title is so far impressed with a trust in favor of the subscribers, that partition between the grantees will not be allowed ; they are not tenants in common in such a sense that either can compel partition. It would be contrary to the trust, and the intention and object of the parties would be defeated. An action of partition would be a breach of trust. The parties were all bound by the contract, and no one could put an end to the contract, which would be the result of a judgment of partition.¹¹ Lands set apart by the State for salt-works are not the subject of partition between the heirs of the person by whom they were set apart by the State authorities. The heirs would take no estate or interest in the premises by descent. There is no estate of inheritance, or for life or lives, or for years, in the above-mentioned salt lands. The fee remained in the State, and the sale of the lands was prohibited.¹² It has been argued that the erection of buildings and occupation would make an inheritable easement.^a It was argued in this case that in setting the lands apart the legislature

¹¹ *Baldwin v. Humphry*, 44 N. Y. 609 ; citing 10 Wend, 218 ; 5 Hill, 526 ; 17 Barb. 263 ; 15 Id. 555 ; 9 N. Y. 502 ; 34 Barb. 173.

¹² *Newcomb v. Newcomb*, 12 N. Y. 603.

^a This doctrine is discussed in 15 Wend. 380 ; 11 Mass. 536 ; 4 East, 108 ; 5 Barn. & C. 210 ; 8 Id. 288 ; 6 Hill, 61 ; 7 Bing. 682 ; 2 Id. 279.

created no estate, and that, to maintain an action of that kind, the plaintiffs must show that their ancestor was seized of an estate of inheritance, that the subject matter is real estate, and that it was derived by descent, and that the parties have a common interest in the subject matter of the action.^b

In a complicated case where there is land under water, an upland and a right of way, held, that such portion or portions of the water-right as have been conveyed by the patentee or his heirs whose residuary interest was vested in the plaintiff, must be excluded from the partition. The plaintiff had no right calling for the exercise of the power of the court to order a sale of the property so conveyed before he acquired title. It was also held, that it never could be sustained to grant a judgment to sell property in which the plaintiff had no interest, on his application; nor could an owner under such circumstances compel an owner of property to submit to the sale of his property at the suit of a person who had no right thereto. As to the parcels of said water-right, in all of which the plaintiff had an interest, but in which the various defendants had dissimilar interests, the objection is that the same parties are not joint owners or tenants in common of all the property sought to be partitioned: that the objection would be

^b *These propositions were perhaps not considered by the court, the case having been decided somewhat upon the constitutional and statutory law of New York.* The following were cited to sustain the propositions referred to: 2 Barn. & Ald. 738; Sen. Doc. 1847, 108, pp. 8, 9; 1 Hilliard Abr. 216; 5 N. Y. 9, 92; Mountjoy's case, Godb. 17; 24 Eng. Com. Law, 136-138; 19 Ves. 144-158; 2 Paige, 27; 8 Johns. 562-564; 11 Wend. 647; 8 Cow. 361, 366, 367, 369, 370; Cow. & H. Notes, 995; Harp. 390; 7 Mass. 503; 1 Root, 147; 1 Hill, 176; 1 N. Y. 564; Laws of 1854, 986.

good if taken in the answer.¹³ All persons interested in the estate to be partitioned must be made parties, and unless this shall have been done a decree of partition will not be made.¹⁴ The purchaser will not get a good title, and the partition will be of little benefit unless the wives of the co-tenants are made parties to the action. It is the duty of the court to require that all interested persons shall be made parties, to the end that the purchaser may get a perfect title.¹⁵ The referee before whom the action is tried has power to amend a complaint upon the trial, by striking out or inserting the names of a party upon such terms as he may deem proper.¹⁶

A receiver appointed in supplementary proceedings cannot partition : his title is such that he cannot maintain an action of that kind.¹⁷ The title to the real estate held by the judgment debtor does not become vested in the receiver ; there being no conveyance from the judgment debtor, no title passed, therefore there could be no co-tenancy,¹⁸ the New York court of appeals having the question before them in November, 1878. There were other questions before the court in reference to the pleadings, but upon this question, the justice, in his able opinion, said : "We are inclined to the opinion that a receiver thus appointed does not obtain such a title to real estate

¹³ Beach *v.* Mayor, &c., 45 How. Pr. 357 ; citing 24 Barb. 478 ; 5 Cow. 461 ; 15 Wend. 597 ; 26 Id. 387, 404 ; 11 How. Pr. 489 ; 19 Wend. 367 ; 9 Cow. 531 ; 14 Johns. 354.

¹⁴ Burhans *v.* Burhans, 2 Barb. Ch. 398.

¹⁵ Knapp *v.* Hungerford, 7 Hun, 590.

¹⁶ 3 Wait Pr. 276 ; also see Knapp *v.* Hungerford, *ante*, where the power to amend is discussed by Justice MULLIN.

¹⁷ Dubois *v.* Cassady, 5 Week. Dig. 210.

¹⁸ Scott *v.* Elmore, 10 Hun, 68 ; citing 19 N. Y. 375 ; 1 Barb. Ch. 592 ; 5 Sel. 142. See 33 Barb. 498.

as will enable him to maintain an action for partition ; but we are not now called upon to decide whether he does or not. ¹⁹

Partition cannot be maintained unless the plaintiff has either actual or constructive possession with the defendants at the time of the commencement of the action. Adverse possession is an absolute bar.²⁰ Before a partition can be maintained, the right of possession must be fully settled. Where there is an adverse possession an estate in co-tenancy does not exist, so far as the right to possession is to be considered, and that is an essential element in the proceedings. Adverse claims to real property can in no way be determined in an action of partition ; the title of the parties should be first established by a proper action brought for that purpose.

It has been held that partition can only be maintained by one who has a seizin in fact of the premises.²¹

Where one tenant in common conveys to another his undivided interest, retaining the use of the premises during his life, the grantee cannot maintain, and is not

¹⁹ Dubois *v.* Cassady, 75 N. Y. 298; 5 Week. Dig. 210, *ante*; citing 45 N. Y. 166; 2 Hilt. 290. Also see 44 Barb. 230; 9 N. Y. 142; 17 Id. 569; 21 Id. 577; 19 Id. 375; 33 Barb. 498; 10 Hun, 68.

²⁰ Sullivan *v.* Sullivan, 66 N. Y. 37; Florence *v.* Hopkins, 46 N. Y. 182, *ante*. Also see, 19 Wend. 367; 9 Cow. 530; 2 Barb. Ch. 398; 59 N. Y. 426; 12 Id. 519; 11 Vt. 129; 56 N. Y. 226; 2 Paige, 387; 3 Barb. Ch. 608; 22 Mich. 65; 4 Hun, 198, reversed, see 66 N. Y. 38.

²¹ Bonner *v.* Kennebeck Purchase, 7 Mass. 475; Rickard *v.* Rickard, 13 Pick. 251. Examine on same subject, 24 Conn. 230; 19 Wend. 367; 5 Denio, 385; 2 Barb. Ch. 398; 36 N. H. 326; 13 N. J. 271.

ON POSSESSION AND RIGHT OF ENTRY. 6 N. H. 109; 14 Mass. 434; 2 Ohio St. 207; 31 Mo. 171; 19 La. Ann. 356; 11 N. Y. Leg. Obs. 116; 1 Edw. Ch. 629.

TRUSTEESHIP. 1 T. & C. 124; 65 Barb. 583.

entitled to partition.²² It seems to have been settled that a partition cannot be had of land to which the parties have only a title in remainder after the determination of a particular estate.²³ The New York Code of Civil Procedure,^o provides for partition among the remaindermen, or reversioners when they are tenants in common among themselves, or, in other words, when there is a co-tenancy as remaindermen or reversioners in the land. An owner in fee of an undivided part of certain land and an estate for life in the residue, is not entitled to partition as between him and persons who have a contingent remainder in such residue.²⁴

To obtain partition in equity it is necessary for the legal title to be clear and undisputed ; yet if the title be equitable, or there are equities to settle, application may be made to a court of equity for that purpose. Equity having once taken jurisdiction, it will decree a partition if proper case be made out therefor. When the question of title is raised during proceedings in equity, the court will order a stay of proceedings until the title can be determined by law, but the court will not do this of its own motion. It is more usual in such cases to dismiss the complaint.^d

A decree for partition or sale of real estate will not be granted amongst heirs, while the personal prop-

²² *Nichols v. Nichols*, 28 Vt. 228, *ante*.

²³ *Culver v. Culver*, 2 Root, 278 ; *Ziegler v. Grim*, 6 Watts, 106 ; *Brown v. Brown*, 8 N. H. 93.

^o § 1533, *ante*. See 15 Mass. 155.

²⁴ *Hodgkinson Petitioner*, 12 Pick. 374.

^a The rulings of the courts, may be found as construed under different laws in Walk. 200 ; 3 Head, 557 ; 3 Humpl. 435 ; 33 Miss. 149 ; 10 Rich. Eq. 428 ; 3 Sneed, 187 ; 4 Rand. 74 ; 10 N. J. Eq. 277 ; 29 Ala. 478 ; 26 Ill. 472 ; 18 How. U. S. 297 ; 2 Ind. 17 ; 3 Md. Ch. 497 ; 39 Miss. 392.

erty appears to be insufficient to pay the debts of the ancestor.²⁵ It is not the business of equity to undertake the administration of estates in the first instance, nor to take the administration out of the hands of persons duly appointed and who are in no default.

If the title claimed by the plaintiff in partition is subject to the right of a third party to enforce a sale for his benefit, or a conveyance to himself, the bill should be dismissed, unless such third party or his representatives be made parties to the suit.²⁶

Partition will not be ordered on the application of an infant, unless it be made satisfactorily to appear that the interests of the infant require such partition sale.²⁷ Where the rights of an infant are involved, a purchaser will be relieved from his bid, if a reasonable doubt exist as to the validity of the title to be acquired.²⁸ And a sale will not be ordered where the rights of infants may be prejudiced, if there be any mode whereby the plaintiff may be assigned a portion of the premises.²⁹ Where the purchaser is relieved of his bid by reason of a defect in the title, he is entitled to be reimbursed his expenses, and, if the funds of the estate are insufficient for that purpose, the parties to the partition suit are personally liable therefor. This includes the guardian *ad litem* of the infant plaintiff. An infant may revive and continue a suit for partition, even though he is prohibited from maintaining the action in

²⁵ *Mathews v. Mathews*, 1 Edw. Ch. 564; adhered to, 7 Paige, 391; approved, 23 Hun, 119-121; commented, 4 Edw. Ch. 47, 48; overruled, 7 Paige, 411. See 22 Wend. 501.

²⁶ *Ford v. Belmont*, 7 Rob. 97.

²⁷ *Struppman v. Muller*, 52 How. Pr. 211; citing 14 Abb. Pr. 299; 26 How. Pr. 250; 34 Barb. 106.

²⁸ *Struppman v. Muller*, *ante*. See 6 Abb. N. C. 343.

²⁹ *Walker v. Walker*, 3 Abb. N. C. 12.

the first instance.³⁰ In such a case, there remains upon the court the duty to protect the infant.

Although the owners of the equity of the redemption may have partition among themselves, mortgage and judgment creditors cannot be compelled to join in it, and no relief can be asked for against them.³¹ The rights of the mortgage and judgment creditors cannot be affected in such an action. The parties are the tenants in common of an interest less than a fee. Those having liens upon the fee cannot be disturbed.

Parties having no vested interest in the real estate are not entitled to a partition or sale.³²

It is irregular for a bill to be filed by a person of unsound mind, not so found by inquisition, by his next of friend, but a proceeding for the sale should be instituted under the lunacy regulation act.³³

Where the legal title is in dispute, or when it depends on doubtful facts or questions of law, a bill for partition will not lie.³⁴

A receiver in supplementary proceedings of a "widow's right of dower" may maintain an action in his own name as such receiver for the admeasurement of the right of dower, but he cannot bring an action of partition.³⁵

³⁰ *McCosker v. Brady*, 1 Barb. Ch. 329.

³¹ *Wotten v. Copeland*, 7 Johns. Ch. 140; citing 1 Ves. & B. 551; followed, *Hopk.* 504.

On suspicious title, see 2 Ves. 59, 679; 1 Dessaus. Ch. 382; 1 *Hopk.* 495.

³² *Woodruff v. Cook*, 47 Barb. 304.

³³ *Halfhide v. Robinson*, 8 Moak Eng. R. 918; citing 15 & 16 Vict. c. 55, § 1; Law R. 4 Ch. 167; Lunacy Regulation Act, 1862.

³⁴ *Chapin v. Sears*, 18 F. R. 814.

³⁵ *Payne v. Recker*, 87 N. Y. 153; reversing 22 Hun, 28. Distinguished, 33 Barb. 498; 20 Johns. 410; citing 57 N. Y. 322; 46 Id. 574; 33 Id. 498; 6 Id. 596; Code of Pro. § 111; 12 Ind. 37; 20

A legatee under a will cannot sustain an action for the partition and sale of real estate where the will contains authority to the executors to sell the same for the purpose of satisfying the bequests made by the testator.³⁶

The will of one S. gave five-sixths of his residuary estate, which consisted of a farm and some personal property, to five of his children, "to be equally divided between them." The remaining one-sixth he gave to a trustee, in trust to pay the interest thereof annually to E., a son of the testator, and in a contingency, a portion of the principal, and at the death of E. to pay the surplus "then remaining," to his children. The executor, however, was empowered to sell the real estate, when and in such manner as he should think proper, "and rent and lease the same until thus sold." In an action for partition of the farm, the court held, that the will created a valid express trust in the executor, who took the legal title, and no estate therein vested in the children; that the power to lease carried with it the power to receive rents; and, although there was no express direction as to the disposition to be made of them, the reasonable impli-

Johns. 410; Code Civ. Pro. § 2468; 5 Paige, 448; 5 Barb. 438; 33 Id. 498; 9 N. Y. 147, 148; 24 Alb. L. J. 32; 48 N. Y. 33; 66 N. Y. 37; 46 Id. 182; 56 Id. 226; 11 N. Y. Leg. Obs. 116; 75 N. Y. 299; 2 R. S. 1123, § 26; 3 Id. 776; 5 Wait Pr. 161, *et seq.*; 26 N. Y. 42; 13 Wend. 524; 1 Barb. 500; Gerard Titles, 168; 2 Cow. 638; 13 N. Y. 322; 12 Id. 622; 11 How. Pr. 97; 38 Barb. 18; 1 Barb. 560; 1 Sandf. Ch. 199; 15 Johns. 319; 2 N. Y. 252; 10 Wend. 414; 36 How. Pr. 260; 2 Barb. 319; 23 How. Pr. 247; 8 N. Y. 110-113; 4 Hun 796; 15 Johns. 80; 3 Paige, 483-503; 3 Abb. N. C. 207; 33 Barb. 498; Code Civ. Pro. § 1532.

See 13 Weekly Digest, 441; S. C., 22 Hun 28. The court of appeals held that the receiver could maintain an action for admeasurement. In this they overruled the decision of the general term in 22 Hun, 28.

³⁶ Davies *v.* Davies, 15 Week. Dig. 118; citing 85 N. Y. 53.

cation was, that they were to go to the persons beneficially interested in the estate ; and that, therefore, partition could not be had. To constitute a valid and legal trust, the law does not imply that the precise words of the statute shall be used. It is sufficient, if the intention to create the trust can be fairly collected and construed from the instrument creating the trust.³⁷

³⁷ Morse *v.* Morse, 85 N. Y. 53; citing 53 N. Y. 351; 2 N. Y. 19; 69 N. Y. 1; 23 Barb. 163; 3 Wheat. 577; Snell Prin. of Equity, 169-171; 2 R. S. 729, § 56; 4 Kent Com. 321; 41 N. Y. 289; 79 Id. 478; 66 Id. 468; 2 Edw. Ch. 156; 42 N. Y. 531; 50 Id. 431. The following may also be examined: 65 Barb. 583; 64 N. Y. 354; 14 Hun, 548; 12 Barb. 113; 42 Id. 580; 72 N. Y. 563; 48 Id. 106; 60 Barb. 63; 7 Lans. 195; 73 N. Y. 360; 70 Id. 139; 65 Barb. 587; 2 R. S. (Banks) 1117, § 142; N. Y. Laws 1853, ch. 238; 4 Abb. N. C. 317; 65 Barb. 250; 2 Edw. Ch. 156; 63 N. Y. 652; 2 Hun, 90; 3 Wheat. 563; 24 Wend. 641; 3 Edw. Ch. 571; 2 Sandf. Ch. 568; 5 Paige, 485; 3 Sandf. Ch. 556; 2 Bouv. Law Dict. 637; Fearne Cont. Rem. 2; Coke Litt. 4 b; Hammond Nisi Prius, 151; 7 East, 200; 1 Ventr. 393; 2 Rolle Abr. 2; 19 Wend. 367; 11 N. Y. Leg. Obs. 116; 11 How. Pr. 489.

CHAPTER V.

POSSESSION, ACTUAL AND CONSTRUCTIVE.

THE detention and enjoyment of real estate held by tenants in common or joint tenants as a right, is the possession of such land so held in co-tenancy, and that right is a necessary element in partition, and it cannot be had without possession, either actual or constructive. Actual possession exists where the thing is in the immediate occupancy of the party. Actual possession means occupancy.^a

Sir William Blackstone considered prior occupancy to be the foundation of title to property. And when the occupant became unwilling, or incapable to continue his occupancy, the disposition of property by sale, by will or by the law of succession and inheritance. Sir Francis Palgrave, an able law commentator, said "that the practical establishment of the theory that the king was the original proprietor of all the lands in the kingdom was to be attributed to the constant working of the crown lawyers, who always presumed that the land was held by feudal tenure, until the contrary could be shown."¹ The same principle of feudal tenure exists in Scotland.² The

^a 3 Dev. 34; Bouvier Law Dictionary, page 435.

¹ Rise and Progress of English Commonwealth, I, 584.

² Bell's Principles, § 676.

fundamental idea of the English law was derived from the maxims of the feudal tenures, that the king was the original owner and possessor, or lord paramount of all the land in the kingdom over which he ruled, and that he was the source of all title, that legal title and legal possession could not be had, unless traced back to the king.³

The same principle has been adopted in this country, and applied to our republican form of government. James Kent says, in his able work, "It is a settled and fundamental doctrine with us, that all valid individual title to land within the United States is derived from the grant of our local governments or from that of the United States, or from the crown or royal chartered governments established here prior to the Revolution." This is the doctrine that has been declared in New York as a constitutional law.⁴ Feudal tenures are abolished in New York,⁵ and all lands within the State are declared to be

³ 3 Kent Com. 377.

⁴ **RIGHT OF PROPERTY IN LANDS—ESCHEATS.** The people of this State, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State; and all lands the title to which shall fail, from a defect of heirs, shall revert, or escheat to the people. N. Y. Const. art. I. § 11.

The acts of 1833 and 1834 concerning relinquishment of escheats are constitutional. 3 N. Y. 29.

Escheats are subject to claims of creditors; 6 Johns. Ch. 360; and outstanding life estates; 2 Hill, 67; and purchase-money. 1 Sandf. Ch. 139.

A trust cannot defeat the right of escheat; as in the case of an alien; 5 Paige, 114; nor adverse possession; 27 Barb. 376; nor naturalization, by retractive effect. 39 N. Y. 333.

*** FEUDAL TENURES ABOLISHED.** All feudal tenures of every description, with all their incidents, are declared to be abolished, saving however, all rents and services certain which at any time heretofore have been lawfully created or reserved. N. Y. Const. art. I.

allodial.⁴ It is upon the allodial principle that the title of lands under water are in the people.⁴ Whatever rights the owner of the adjoining lands may have in the lands below high-water mark are public rights, which the people have, he is one of the people; and he can not undertake to control the land beneath the water, such lands are under control of the Legislature. This does not refer to a mill-pond, or a small stream upon a farm, but to State waters, such as the Hudson river.

Our courts are not apt to notice claims made to land within this State under grants made by the French Government in Canada prior to the treaty between Great Britain and France, in 1753; at most, they are equitable claims, and afford no evidence of legal title that can be recognized by a court of law.⁵ Purchases made from Indians under competent sanction of the government of the United States, vested good title in the purchaser and gave him the right to the possession of the land.⁶ This opinion is contrary to previous authorities upon the same subject; but the law seems to be settled, that a purchase

⁴ ALLODIAL TENURE. All lands within this State are declared to be allodial, so that, subject only to the liability to escheat, the entire and absolute property is vested in the owners, according to the nature of their respective estates. N. Y. Const. art. I. § 13.

⁴ *Gould v. H. R. R. Co.*, 6 N. Y. 522; citing 8 Cow. 146; 4 Wend. 9; 4 N. Y. 195; Am. Jur. No. 37, p. 121; 26 Wend. 414; 5 Mason, 195; 3 Kent Com. 432; 5 Wend. 444; 17 Id. 590; 20 Id. 149; 26 Id. 404; N. Y. Laws 1835, ch. 232; Blacks. Com. 261; 10 Pet. 662; 2 Johns. 322; 2 Pick. 44, 8 Watts, 434; 22 Wend. 425; 3 How. U. S. 222; 16 Pet. 367; 2 McLean, 376; 10 Johns. 236; 5 Ham. 410.

⁵ *Jackson v. Ingraham*, 4 Johns. 163; distinguished in 8 Cow. 610. See 8 Barb. 163.

⁶ *Mitchel v. United States*, 9 Pet. 710. See Hob. 322; Co. Litt. 1, 41, b; 4 Bac. Abr. 157, Day Com. Dig. 76. This case was affirmed in 15 Pet. 52, 80. See 6 Pet. 515.

from Indians with the approbation of the proper government agent carries title and right of possession. This refers especially to purchases made at Indian treaties.⁷ It is judicially settled in Kentucky and Ohio, and in the supreme court of the United States, that a patent for land conveys the legal title, and the right of possession, but leaves all equities open; and the courts may go behind the patent, and examine into the equity of the title.⁸

In order to have a complete possession two things are required: that there be an occupancy, *apprehension*, or taking, and that the taking be with intent to possess. A taking with the intent to disturb another, but not to occupy, is not a possession in law. It has been said that children, insane people and idiots cannot possess nor acquire possession, because they have no legal will of their own, and therefore have not the legal power to take. But people who have not the will of their own to possess a thing, have the right to possess, and a court of law or of equity is bound to protect that right against all aggressors. While, as a general rule, an infant cannot maintain an action of partition of lands of which it is one of the co-tenants, if it is for the best interest of the infant that the lands subject to such co-tenancy should be partitioned or sold, and the proceeds distributed, the court will allow such infant to file a bill for such relief, and the court will also protect the interests of the infant in all the proceedings. While the common-law rule may be against the idea that the infant has power to take and possess, the court will take and possess for the infant, and render its protection to all of his interests in the case, and will

⁷ *Colman v. Doe*, 4 Smedes & M. 40.

⁸ *Brush v. Ware*, 15 Pet. 93.

see that all the rights of the one barred by age were rendered unto the one to whom they belong. This rule is applicable to idiots and lunatics. Possession may be shown by fencing, cultivating or otherwise improving the land, or performing any ordinary acts of ownership over it, as by using it for a wood lot.⁹

A person may cease to reside upon land which he has occupied, but without any intention of abandoning the possession of the land. This is civil possession. It is the detention of a thing by virtue of just title and under the conviction of possessing as owner.¹⁰ The failure to take possession is sometimes considered a badge of fraud. In Connecticut, Delaware, Georgia, Massachusetts, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Virginia, and probably in other States, the real and personal estates of intestates are distributed among the heirs without any reference or regard to the actual seizin of the ancestor.¹¹ In Maryland, New Hampshire, North Carolina, and Vermont the doctrine of *possessio fratriss*, it seems, still exists.¹² By the common law the ancestor from whom the inheritance was taken by descent must have actual seizin of the lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or by being in the receipt of rent from the lessee of the freehold. But

⁹ *Machin v. Geortner*, 14 Wend. 239; citing 9 Wend. 56.

¹⁰ La. Civ. Code, 3392, 3394.

¹¹ *Reeve Desc.* 377; 4 Mass. 467; 3 Day, 166; 2 Pet. 59.

¹² 2 Pet. 625; *Reeve Desc.* 377; 4 Kent Com. 384.

AS TO THE FAILURE OF THE PURCHASER TO TAKE POSSESSION. See *Sugd. Vend.* 8, 9; 1 *Ves.* 226; 11 *Id.* 464; 12 *Id.* 27; 1 *Me.* 109; 6 *Cow.* 632; 9 *Id.* 241; 5 *Wheat.* 116; *Code of Two Sicilies*, art. 2134; *Bavarian Code*, b. 2, c. 4, n. 5; 2 *Greenl. Ev.* §§ 614, 615; *Co. Litt.* 57 a; *Cro. Eliz.* 777; 7 *Johns.* 1.

there are qualifications as to this rule, one of which arises from the doctrine of *possessio fratis*. The possession of a tenant for years, guardian or brother, is equivalent to that of the party himself, and is termed in law *possessio fratri*.

Constructive possession is that which exists in contemplation of law without personal occupation.¹³ It must relate to and rest upon legal title; it is made of acts short of possession in fact, which, supported by the legal title, amount in law to actual possession. If there is no valid title there can be no constructive possession.¹⁴ Where a person enters upon land without the color of title, he is deemed in possession of no more than he actually occupies.¹⁵ Entering on land and surveying it, or cutting timber, on a lot designated and acknowledged by metes and bounds, would be evidence of possession.¹⁶

Mere possession of land, however recent, is a sufficient title and possession to support an action of trespass against one who has not a better right.¹⁷ Where a person claiming to own land, but not occupying it himself, but places his servant upon it, or leases it to some one either to cultivate on shares or for rent, it is an occupancy upon the part of the person so claiming to own such land and is a possession.¹⁸

¹³ 11 Vt. 129; 1 McLean, 214, 265; 2 Blacks. Com. 116.

¹⁴ Clements *v.* Yturria, 81 N.Y. 285; citing 15 Wall. 395; 20 Id. 459; 92 U. S. 165; 93 Id. 605.

¹⁵ Moor *v.* Campbell, 15 N. H. 208.

¹⁶ Sawyer *v.* Newland, 9 Vt. 383; Cobleigh *v.* Young, 15 N. H. 493.

¹⁷ Cutters *v.* Cowper, 4 Taunt. 547. See 1 Hawks, 485; 26 Vt. 170; 34 Ala. 159; 4 Harring. 345; 18 Barb. 80; 11 Ind. 417; 2 Head, 398; 2 Dutch. 525; 55 Me. 103; 8 Gray, 415; 75 Ill. 566; 113 Mass. 29.

¹⁸ Lamb *v.* Swain, 3 Jones, 370.

The doctrine of constructive possession in Vermont is, that a deed of land which is recorded, shall, so far as the grantee's title is concerned, be a substitute for a permanent inclosure.¹⁹ Where a person occupies and improves under a deed a tract of land, a portion of which is inclosed, he is deemed in possession of the whole, especially if he make a notorious claim to the whole.²⁰ It is not necessary in such a case that the claim of the owner be by a recorded deed, or that it should be by a deed containing all the statutory requirements and requisites to convey land.²¹ If a person own two adjoining lots of land, by different titles, the possession of one does not extend by construction to the other.²² Yet where several detached lots of wild land in the same county are included in one mortgage, and the mortgagee enters on one lot in the name of all, he has constructive possession of all;²³ and a contract for the sale and delivery of the possession of land, and the improvements thereon, must be in writing. If it is not in writing, it is within the statute of frauds. Possession of land is *prima facie* evidence of title, and is an interest in land within the statute.²⁴ Mining claims are an interest in land.²⁵ But a contract for the sale of shares in a mining company, conducted on the cost-book principle, is no interest or possession in lands.²⁶

¹⁹ Chandler *v.* Spear, 22 Vt. 88.

²⁰ Crowell *v.* Beebe, 10 Vt. 33; Kincaid *v.* Loque, 7 Mo. 167; Welch *v.* Louis, 31 Ill. 446; Gent *v.* Lynch, 23 Md. 58.

²¹ Swift *v.* Gage, 26 Vt. 224.

²² Moris *v.* Hayes, 2 Jones (N. C.) 93.

²³ Greene *v.* Pettingill, 47 N. H. 375.

²⁴ Howard *v.* Easton, 7 Johns. 205. See 5 Id. 272.

²⁵ Copper, &c. Co. *v.* Spencer, 25 Cal. 18. See Gore *v.* McBrayer, 18 Cal. 582.

²⁶ Watson *v.* Spratley, 10 Exch. 222; 24 L. J. Exch. 53; 18 C. B. 336, 845.

The right of possession is either apparent or actual. At common law the heir of a disseizer had an apparent right, because he was not subject to be turned out by mere entry, while the actual right was in the disseizee, who might enforce it by real action. Possession is actual when there is an occupancy, according to the adaptation of the land to use; constructive, when there is a paramount title; adverse, when there is such an appropriation as will inform the vicinage that it is in the exclusive use of a known person.²⁷ Where a son goes into possession of his father's land and makes improvements, the jury cannot infer from that fact alone a gift from the father.²⁸ In order that title may be presumed from possession, such possession must be consistent with an unqualified ownership.²⁹ The right of possession and the right of property are necessary to constitute a complete title. Joint tenancy requires the following points, *viz.* : Unity of interest, title, time and possession. Coparceners, like joint tenants, have a unity of title, interest and possession. They are seized *per my et per tout*. But there is no survivorship between them. The only unity required in tenants in common is the unity of possession.³⁰ In general, the possession of one joint tenant is the possession of all, and is not adverse to the title of others. "Where one of several heirs enters or remains in possession of lands, at the death of the ancestor, the law presumes that he entered, not to abate the shares of his brothers and sisters, but to preserve them for their use, and, his entry

²⁷ *Morrison v. Kelley*, 22 Ill. 610.

²⁸ *Hugus v. Walker*, 12 Penn. 173.

²⁹ *Colvin v. Wolford*, 20 Md. 395; 39 Vt. 359-525.

³⁰ *Spencer v. Austin*, 38 Vt. 258. See *Wiggin v. Wiggin*, 43 N. H. 561.

being consequently theirs, no mere lapse of time will countervail the presumption and give him title in severalty." In an ejectment suit the plaintiffs claimed as devisees of one who, with his brothers and sisters, had inherited the land from their mother, to whom it was said to have descended, and who took possession and held it for over forty years. The defendants claimed as devisees in remainder of the father, who survived his wife for many years, and who, claiming the land, had devised it to the above named devisor for life, with the remainder to them. Held, the mere acquiescence of the mother's heirs in the long possession of their brother would not bar their right to recover, nor be such a recognition and treatment of the title, as coming from the father, as to estop them from setting it up under their mother. Therefore it was error to submit the question of the treatment of the property to the jury, with instructions to find for the defendants, in case it had been treated as above stated.³¹

If a person be found in possession of land, claiming it as his own in fee, it is *prima facie* evidence of his ownership and seizin of the inheritance. But it is not the possession alone, but the possession accompanied with the claim of the fee, that gives this effect by construction of law to the acts of the party. Possession *per se* evidences no more than the mere fact of present occupation by right; the collateral circumstances must determine what is the extent and quality of the interest.³² An entry into possession of a tract of land under a deed containing specific

³¹ *Tulloch v. Worrall*, 49 Penn. 133.

³² *Ricard v. Williams*. 7 Wheat. 59, 105. See 4 Mass. 354; 5 Id. 240; 6 Id. 143; 10 Id. 464; 2 Atk. 632; 11 East, 51; 16 Johns. 302; 2 Caines, 183; 4 Day, 284; 2 Conn. 607; 1 Mod. 217.

metes and bounds, gives a constructive possession of the whole tract, if not in any adverse possession, although there may be no fence or inclosure round the outside of the tract, and an actual residence on only a *part* of the premises. A fence is not a necessity to actual possession. Where there has been an entry on land under a color of title by deed, the possession is deemed to extend to the bounds of that deed, although the actual settlement and improvements were on a small portion only of the tract. In such a case, where there is no adverse possession, the law construes the entry to be co-extensive with the grant to the party, upon the ground that it is his clear intention to assert such possession.³³ Where a person is in possession of lands, claiming under an adverse but defective title, without any fraud either of himself or his grantors, he can not be held to be the trustee of the party holding the true title; nor, if he has sold the lands, can he be made to account for the proceeds of the sale.³⁴ A person seized in fee simple has constructive possession, and is presumed to be in actual possession.³⁵ A stranger can not intrude upon the possession of a patentee of lands.³⁶ Under the Tennessee statute of limitations, peaceable and uninterrupted possession upon claim to hold the land adverse to all other per-

³³ *Ellicott v. Pearl*, 10 Pet. 412; citing 13 Ves. 143, 514; 13 East, 327; 10 Barn & C. 17; 3 T. R. 707; 14 East, 323; 4 Camp. 414; 7 Cranch, 290; 5 Term R. 123; 8 East, 539; 1 Wheat. 6; 1 Mod. 282; 4 Monroe, 442; 3 Littell, 19; 1 Dana's Kent, 267; 2 Id. 127, 148, 149, 354; affirmed, 1 McLean, 206. See 6 Pet. 61; affirming 1 McLean, 86; 11 Pet. 52; 11 How. 498; 5 Cranch C. Ct. 472; Hemp. 348; 1 McLean, 269; 14 East, 327.

³⁴ *Gaines v. Lizardi*, 1 Woods, 56.

³⁵ *Lamb v. Burbank*, 1 Sawyer, 227.

³⁶ *Cowell v. Lammers*, 21 Fed. R. 200; citing 96 U. S. 513; 106 Id. 447; 1 Sup. Ct. Rep. 389; 16 Cal. 320; 104 U. S. 640; 8 Sawyer, 645; 16 Fed. R. 348.

sons, begun under a grant or deed of conveyance founded upon a grant, and continued seven years, gives a complete title.³⁷

Under the Mexican law, when a grant of land was made by the government, a formal delivery of possession to the grantee by a magistrate of the vicinage was essential to the complete investiture of title. This proceeding, called, in the language of the country, the delivery of judicial possession, involved the establishment of the boundaries of the land granted, when there is any uncertainty with respect to them.³⁸ Occupancy under a mere license from a governor, mission priest, or local commander, without any proof of or reason for presuming some grant, cannot be the basis of a valid claim of possession.³⁹ Voluntary abandonment of land should not be presumed under ordinary circumstances.⁴⁰ It has been held that the mere possession of a building upon land is not conclusive evidence of possession of the premises upon which the building stood. It would depend upon the claim made by the one so in possession—that is, whether he undertook to control the use of the building or the occupancy of the surrounding premises.⁴¹

One having the legal title to and entitled to the possession of real estate, except so far as he may subject himself to indictment, or otherwise to prosecution for forcible entry and detainer, may use all the force which is

³⁷ *Piles v. Booldin*, 11 Wheat. 325.

³⁸ *Van Reynegan v. Bolten*, 95 U. S. 33.

³⁹ *Serrand v. United States*, 5 Wall. 451. See 1 *Saw.* 347; 1 *Wall.* 721.

⁴⁰ *Nunez v. United States*, Hoffm. L. Cas. 100. See 23 *How.* 262, 321.

⁴¹ *Oldershaw v. Garner*, Upper C. B. Q. 37. See 8 *Ellis*, 738; 42 *Conn.* 226; 114 *Mass.* 479.

reasonable, proper and necessary to remove one who is wrongfully in possession of the premises, even by pulling down the building thus wrongfully occupied by such person. Notice should first be given.⁴² Where a purchaser pays for land, but does not take the deed, he does not become seized, but only acquires an equitable interest, which he must enforce in equity. An action of ejectment includes trespass, and the alleged trespasser may assert title in himself.⁴³

It is the better rule not to use force. The courts furnish ample remedies for the regaining of possession of lands wrongfully withheld.⁴⁴

Possession by the guardian of a female is sufficient for all the rights and equities of the ward.⁴⁵ A person coming into possession under a will cannot obtain a right of possession adverse from others claiming under the same will; possession as to them is fiduciary. As a general rule, a person in possession in good faith, though wrongfully in possession, is entitled to compensation for improvements upon the premises.⁴⁶ If he improves, knowing the land is not his, the improvements are his loss. Persons who

⁴² *Burling v. Read*, 11 Q. B. 904; *Hyat v. Wood*, 4 Johns. 150. See 16 Johns. 200; 8 Wend. 560; 4 Den. 449; 17 Id. 256; 1 Johns. Cas. 123; 13 Pick. 39; 3 L. & Eq. Rep. 217; 7 Ind. 627; 5 West Law. Mo. 80; 67 Ill. 358; 49 Barb. 175; 4 Johns. 150; 41 Ill. 314; 14 Wend. 239; 15 Barb. 594.

⁴³ *Jackson v. Seelye*, 16 Johns. 197; explained in 16 Pet. 57. See 3 Johns. 216; 11 Id. 91; 4 Com. Dig. 131. *Jackson v. Seelye* is cited in 6 Cow. 736; 9 Id. 269; 3 Wend. 651; 7 Id. 379; 9 Id. 202; 43 N. Y. 158; 12 Barb. 655; 64 How. Pr. 267; 25 Minn. 118; 14 Id. 430; 3 Mas. 363.

⁴⁴ N. Y. Code Civ. Pro. § 2233; 2 Edm. 523; 73 N. Y. 529; 43 N. Y. 152; 24 Barb. 16; 17 Wend. 257; 37 N. Y. 252; 15 Barb. 590; 11 Pick. 387.

⁴⁵ *Davis v. Rhame*, 1 McCord Ch. 191.

⁴⁶ *Barlow v. Bell*, 1 A. K. Marsh. 246.

come into possession of land *pendente lite* claiming title to it under the parties to the bill, or some of them, stand in the same predicament with those whom they represent in point of interest.⁴⁷ The possession of an agent or bailee is not adverse until after demand.⁴⁸ It has also been held that a mere contract for the sale of land does not give the purchaser right of possession.⁴⁹ Where the vendee of land is in possession under a parol agreement, rendered valid by part performance, the vendor cannot, by a subsequent contract of sale, to which such vendee is not a party, take away the rights of the latter under his contract, or burden them with onerous conditions.⁵⁰ The possession of land occupied by a highway is in the owner subject to the use of the public for traveling. Such owner may maintain an action against any one who appropriates to himself any portion of such highway.⁵¹

The lowest and most imperfect title to land is the naked possession thereof. Naked possession is the actual occupation of the estate without the right to do so, or right to the property subject to controversy, until the lawful owner asserts his rights to the possession is deemed *prima facie* evidence of title.⁵²

A lease of real estate to take effect or commence on a certain future day, with an agreement to give possession, entitles the lessee to possession upon that day, and

⁴⁷ *Tongue v. Mortin*, 6 Har. & J. 21.

⁴⁸ *Lever v. Lever*, 1 Hill Ch. 67.

⁴⁹ *Eggleston v. N. Y. & H. R. R. Co.*, 35 Barb. 162.

⁵⁰ *Merrithew v. Andrews*, 44 Barb. 200.

⁵¹ Cowen's Treatise, § 521. See 9 Ham. 165; 44 Vt. 49; 8 Am. R. 363; 16 N. Y. 97; 31 Id. 151; 11 Barb. 390; 27 Id. 543; 15 Johns. 447; 20 Id. 743; 20 Wend. 121; 6 Mass. 454; 6 Pet. 498; 9 Iowa, 450, 594; 16 Ind. 338; 5 Wis. 27; 28 Conn. 165.

⁵² Cowen's Treatise, § 722; 2 Blacks. Com. 195-199; 1 Ins. 345.

an entry is not necessary that he may maintain an action for possession.⁵³ Possession of sub-tenant is the possession of the tenant. Possession of land is constructive notice to a purchaser, mortgagee or others of the occupant's title and equities, but to act as such constructive notice there must be actual occupation, or an open, visible use and improvement of the premises.⁵⁴ When the possession of property is shown to be equally consistent with an outstanding title in a third person, as with title in one having possession, no presumption of ownership arises simply from such possession.⁵⁵

Cowen defines constructive possession as follows: "Where the owner of property in actual possession of another, has the right to reclaim it immediately, he has the constructive possession; as where A in York sells or gives to B a chattel which is in London, B has a right of action against any one who injures it, for which he may maintain an appropriate action."⁵⁶

This may be termed a fair definition, and applicable to real property as well as personal. Possession may be actual, or it may be a right that one has who is not in actual control or occupancy. It may be a right that is not acquired. It may be a right that one is to have at a

⁵³ *Trull v. Granger*, 8 N. Y. 115.

⁵⁴ *McAdam on Landl. & Tenant*, § 81; 15 N. Y. 354; 3 Paige, 421; 43 Me. 519; 20 N. Y. 400; 5 Lans. 160.

⁵⁵ Cowen Treatise, § 1493; *Rawley v. Brown*, 71 N. Y. 85; citing 60 N. Y. 221; 6 Lans. 180; 45 Barb. 304; 3 Hill, 90; 62 N. Y. 1; 18 How. 424; 45 N. Y. 549; 21 Barb. 333; 1 Greenl. Ev. § 34; 15 Barb. 595; 53 Id. 262.

⁵⁶ Cowen's Treatise, § 564. See *Chitty Pl.* 129; 3 Levy, 37; 7 Cow. 735; 10 Wend. 349; 27 N. Y. 277; 13 Hun, 26; 41 Penn. 291; 6 Barb. 79; 10 Wend. 349; 15 Id. 631; 8 Barb. 213; 5 Denio, 527; 3 Wend. 280; 4 N. Y. 183; 20 Johns. 465; 14 Wend. 201.

future time, but it is a possession recognized in law, and protected by the courts of law. There must be either actual or constructive possession or there can be no partition.

NOTE.—Examine 66 Barb. 386; 15 N. Y. 354; 12 Ohio N. S. 131; 1 Oregon, 300; 20 Ill. 59; 72 N. Y. 160; 5 Barb. 51; 3 Hill, 330; 2 Hilt, 550; 55 N. Y. 280; 3 J. J. Marsh. 278; 4 Rand. 58; 1 Dana, 92.

CHAPTER VI.

ADVERSE POSSESSION.

ADVERSE possession is the enjoyment of land, or such estate as lies in grant, under such circumstances as indicate that such enjoyment has been commenced and continued under an assertion or color of right on the part of the possessor.¹ When such possession has been actual and has been adverse for twenty years, of which it is the duty of the jury to judge from the circumstances, the law raises the presumption of a grant.² This arises only when the use or occupation would otherwise have been unlawful.³

It is not necessary that there should be a rightful title to constitute an adverse possession. But it must be a possession under the color and claim of title, and exclusively of any other right.⁴ To maintain a title on a claim of adverse possession, such possession must be adverse at its first commencement, and continue so unin-

¹ 3 East, 394; 1 Pick. 466; 3 Penn. 132; 8 Conn. 440; 9 Johns. 174; 43 Ala. 643; 9 Johns. 174.

² Angell on Waterc. 85.

³ 3 Me. 120; 6 Cow. 617-677; Id. 589; 4 Serg. & R. 456; 5 Pet. 402.

⁴ Smith *v.* Burtis, 9 Johns. 174; citing 6 East, 80; Co. Litt. 374a; 2 Caines, 129; 8 Johns. 84; 9 Id. 77.

terruptedly for at least twenty years.⁵ To give rise to title, such possession must be actual, definite, notorious, continued, adverse, exclusive, and with an intent to claim ownership by him who asserts the title by possession. The time which possession must continue is usually fixed by statute.⁶ It may be in a series of individuals, holding in privity of estate with each other, or with the one who claims title by possession.⁷ Where one who enters upon land under an assessment lease subsequently grants the land in fee to another, who enters and holds under that grant, claiming title, the possession is adverse to that of the owner of the reversion, and a conveyance from the latter is void. Entry and possession under a deed without right is under color of title, and is adverse possession.⁸

If the actual and legal owner establishes his title, his adversary must show, by strict and positive proof, that his title and possession are adverse to the title and right of possession of such actual and legal owner.⁹ Title must be proved to render void a deed because of possession of

⁵ *Brundt v. Ogden*, 1 Johns. 156. See *2 Caines*, 224. See vol. 2, page 526, court of errors.

⁶ *Robinson Elementary Law*, 1875, page 22, 1882, pp. 78-79; 3 Washb. Real. Prop. vol. 2, § 2; 24 Wend. 587.

⁷ *Jackson v. Ellis*, 13 Johns. 118. See 18 Johns. 40; 5 Cow. 483; 9 Johns. 174; 1 Wend. 341; 12 Id. 602; 3 Hill, 513; 5 Cow. 74; 7 Cow. 323; 8 Id. 589; 13 Johns. 499; 5 Cow. 346; 7 Id. 353; 1 Id. 276; 8 Wend. 440; 6 Cow. 617; 7 Wend. 62; 12 Johns. 365; 2 Johns. 230; 10 Id. 475; 13 Id. 513; 23 Wend. 316; 9 Cow. 653.

⁸ *Sands v. Hughes*, 53 N. Y. 287; citing 5 Cow. 123; 7 Id. 323; 6 Wend. 233; 4 Den. 431; 4 Johns. 402; 13 Barb. 147; 6 Cush. 34; 31 Penn. St. 94; 12 Johns. 452; 13 Id. 406; 24 Wend. 87; 22 N. Y. 170; 24 Wend. 587; 9 Cow. 558; 13 Johns. 118; 18 Id. 355.

⁹ *Tylor v. Hudorn*, 46 Barb. 464. See 9 Wend. 520; 3 Johns. Cases, 124; 9 Johns. 163; 36 N. Y. 643; 22 Id. 177; 13 Barb. 147; 5 Cow. 128.

the land by another.¹⁰ A title set up as adverse to an established legal title must be equal to it in character to render void a deed.¹¹ The title from the lease was subordinate to the legal title, though adverse possession existed.¹²

The rule above referred to relative to one holding under an assessment lease, applies only where the conventional relation of landlord and tenant exists, and some rent or return is in fact reserved to the former, and not where the relation arises by the mere operation of law. It is founded upon the acknowledgment of title in the lessor, which is implied from the acceptance of the lease, and the payment of rent and the confidence reposed by the lessor in the lessee, to whom the possession of the land is intrusted, and where there is a valid assessment or tax lease outstanding, the statute of limitations will not run during the term against the reversioner or his heirs, for the reason they are not entitled to the possession. Until they are entitled to enter, the statute will not run. It will begin to run only from the expiration of the term.¹³

There is no rule which prevents a hostile title being acquired, or an adverse possession being gained during the running of an assessment lease, which possession would ripen into title in twenty years after the end of the term.¹⁴

¹⁰ *Crary v. Goodman*, 22 N.Y. 176; *Fish v. Fish*, 39 Barb. 513; 53 Id. 247; 33 N.Y. 658; 5 Wend. 532.

¹¹ *Livingston v. Peru Iron Co.*, 9 Wend. 516. See 1 Abb. Pr. N.S. 111; 17 Barb. 667; 19 Id. 651; 5 Cow. 74; *Willard on R.E.* 356; 53 Barb. 248.

¹² *Legett v. Rogers*, 9 Barb. 411. See 46 Barb. 464; *Laws 1816*, ch. 115.

¹³ *Jackson v. Shoemaker*, 4 Johns. 402. See 6 *Cush.* 34.

¹⁴ *Statute of Limitations does not run against reversioner or remainderman, till after the determination of the particular estate.*

A possession and claim of land under an executory contract of purchase, is not such an adverse possession as will render a deed from the true owner void. Nor is it such adverse possession as if continued for twenty years will bar an entry within the statute of limitations, and is in no sense adverse as to the one with whom the contract is made.¹³ There must be a claim of entire title, with no admission of higher title.¹⁴

Possession of land by a purchaser under a deed for the entire lot, given without right to the grantor, is adverse to the rightful owners, though tenants in common with the grantor; and a subsequent deed executed by them during such adverse possession is inoperative and void, and subsequent releases by them to the grantor of the defendant, or the person under whom he derives title, inure to the benefit of the defendant. A person in possession of land, claiming title, may purchase in an outstanding title to protect the possession.¹⁵

Adverse possession is a legal idea, admits of a legal definition, of legal distinctions, and is correctly laid down as a question of law, and may be set up against any title whatsoever, either to make out a title under the statute of limitations, or to show the nullity of a conveyance executed by one out of possession.¹⁶ The common law generally regards disseizin as an act of force, and always as a tortious act, yet out of regard to having a tenant to

See 4 Johns. 390; 8 Id. 262; 10 Bosw. 100; 17 Abb. Pr. 117; 37 Miss. 164; 22 N. H. 491; 29 Ga. 355; 50 Vt. 166; 1 Head, 276; 40 Ill. 260.

¹³ *Jackson v. Johnson*, 5 Cow. 74. See 1 Cow. 610; 18 Johns. 488; 1 Id. 156; 1 Cow. 605.

¹⁴ *Smith v. Burtis*, 9 Johns. 180, *ante*.

¹⁵ *Jackson v. Smith*, 13 Johns. 406; citing 10 Johns. 166; 12 Id. 490; 8 Id. 139; 5 Id. 489.

¹⁶ *Jackson v. Huntington*, 5 Pet. 402.

the *precipe*, and one promptly to do service to the land, it attaches to it a variety of legal rights and incidents, and if there be a tenancy in common, the law appears to be definitely settled in New York that the grantee of one tenant in common for the whole entering on such conveyance, may set up the statute against his co-tenants in common.

Where the defendant, having purchased a lot of land, and received a deed for the whole lot, in which the grantor stated himself to be the heir of the patentee, and he entered into possession under that deed, and it afterwards appeared that the grantor had title to one-ninth of that lot only as a tenant in common, but that he must be deemed to have entered under his deed, as sole owner in fee of the whole lot. Possession of land by the purchaser under a deed for the entire lot, given without right in the grantor, and a subsequent deed executed by them during such adverse possession, is inoperative and void, and subsequent releases by them to the grantor of the defendant or the person under whom he derives title, inures to the benefit of the defendant.¹⁷

There must be title somewhere to all land in this country, either in the government or in some one deriving title from the government, State or national. Any one in possession with no claim to the land whatever, must, in presumption of law, be in possession in amity with and in subservience to that title. Where there is no claim of right, the possession cannot be adverse to the true title. Such was the rule given in 1854 by the court of appeals in

¹⁷ *Jackson v. Smith*, 13 Johns. 406; citing 10 Johns. 166; 12 Id. 490; 8 Id. 139. A grant of land held adversely is void. 15 Wend. 171; 5 Id. 532.

Virginia.¹⁸ The court there said: "An entry by one upon land in possession, actual or constructive, of another, in order to operate as an ouster, and gain possession to the parties entering, must be accompanied by a claim of title."¹⁹ The doctrine of adverse possession is to be taken strictly, and must be made out by clear and positive proof, and not by inference. Every presumption is in favor of possession in subordination of title to the true owner; and if a subsequent purchaser has notice at the time of his purchase of a prior unrecorded deed, it is the same to him as if such deed had been recorded; and if the agent of such subsequent purchaser, at the time of making the purchase, knows of the prior unrecorded deed, it is the same as notice to his principal.²⁰ Possession, without claim of title, is not adverse, but is deemed the possession of the owner. If a man have title as tenant in common and be in possession, he is presumed to hold for himself and his co-tenants: but such possession may be rebutted by proof of acts or declarations indicating an intention to exclude his co-tenants, such as a disavowal of his holding as a tenant in common: and if he in fact keeps out his co-tenants, such acts and declarations constitute an ouster, and his possession from that time becomes adverse within the meaning of the statute. Neither fraud in obtaining or continuing the possession, or knowledge, on the part of the tenant, that his claim is unfounded, wrongful and fraudulent will

¹⁸ *Kencheloe v. Tracewell*, 11 Gratt. 605.

¹⁹ *Society, &c. v. Town of Pawlett*, 4 Pet. 504; *Ewing v. Burnett*, 11 Pet. 52; *Harvey v. Griswold*, 2 Wall. 238.

²⁰ *Jackson v. Sharp*, 9 Johns. 163; citing 8 Johns. 220; 3 Atk. 646; 1 Ves. 64; Amb. 436; 13 Ves. 120; cited in 21 N. Y. 120; 29 Wis. 252; 40 Mich. 541; 42 Ind. 101; distinguished in 10 Johns. 166.

excuse the negligence of the owner in not bringing his action within the prescribed period; nor will his ignorance of the injury, until the statute has attached, excuse him, though such injury was fraudulently concealed by the contrivance of the wrongdoer. A possession to be adverse must be inconsistent with the title of the claimant who is out of possession; it must be accompanied with a claim of title exclusive of the rights of others; and must be accompanied with a claim of title exclusive of the rights of all others; and must be definite, notorious and continued for the period of twenty years. Where there is an actual occupation of premises, an oral claim is sufficient to sustain the defense of adverse possession; it is only where a constructive adverse possession is relied on, that the claim must be founded on color of title by deed or other documental semblance of right.²¹

Claim or color of title is necessary to establish adverse possession.²²

²¹ *Humbart v. Trinity Church*, 24 Wend. 587; citing Story Eq. Pl. § 484; 5 Barn. & C. 149; 7 Dowl. & R. 729; 5 Wend. 30; 17 Id. 202; 2 Mumf. 511; 3 Murph. 115, 118, 278; 539; 4 Bligh P. C. Old Series, 1; 8 Cow. 589; 1 Irish T. R. 332, 340; 2 Grah. His. U. S. 255; 19 Johns. 372. On fraudulent entry and adverse possession, cited, 4 Sandf. Ch. 739; 22 N. Y. 177; 34 Barb. 63; 12 Abb. Pr. 278; 4 Ben. 466; 63 Mo. 246; 41 N. J. L. 541; distinguished in 43 N. Y. 439; affirming 7 Paige, 195.

Tenant in common presumed to hold. 16 Hun, 92; 23 Cal. 247; 24 Id. 376.

²² *Grant v. Winborne*, 2 Hayw. 57. See 2 Wall. 328; 3 Woodb. & M. 538; 4 Wash. C. Ct. 609; 1 Paine, 457; 5 Pet. 485; 1 Wheat. 292; 10 Pet. 177; 16 Id. 25; 8 Id. 244; 18 How. 50; 5 Pet. 402; 13 How. 472; Hempst. 624; 4 McLean, 489; 11 How. 414; 9 Wheat. 541; 5 Blatchf. 481; 1 Sawyer, 15, 227; 5 Biss. 177; 94 U. S. (4 Otto) 6; 11 Gill & J. 371; 9 Serg. & R. 26; 1 Paine C. Ct. 457; 2 Wall. 328; 11 Gratt. 605; 11 Pet. 41; 8 Cow. 589; 15 Ga. 336; 2 Bailey, 603; 1 B. Mon. 364; 8 Shep. 350, 240; 6 Id. 387; 5 Id. 210; 5 Barr, 103; 6 Burr. 210; 9 Metc. 418; 2 Spear, 288; 3

It is not the law that there should be a rightful title, and only necessary that possession be taken under color or claim of title, and continued for the requisite period, to bar an action under the statute of limitations. It is immaterial whether the title be defective or not, or whether the occupants make color under a written or parole contract, or even any contract at all. An adverse possession for twenty years, under claim or color of right, gives a title. It is not necessary, to constitute such adverse possession, that it should be taken under a good or rightful title, and if on the trial the defendant shows that he took possession, claiming under a deed, he is not bound to produce the deed, though called for by the plaintiff, but he may rely on his adverse possession.²³

A written conveyance will support an adverse, however worthless the supposed title may be. A deed purporting to be executed by virtue of a power of attorney from the owner of the land, which power is not proved, affords sufficient color of title on which to found an adverse possession, providing there has been a good constructive occupation under it.²⁴ One tenant in common claiming title to the whole under a warranty deed from a

Conn. 403; 2 Hayw. 69; 1 Har. & McH. 151; 53 N. Y. 296; 7 Barb. 101; 8 Id. 156, 26 Id. 402; 33 Id. 498; 64 Id. 526; 3 Abb. N. C. 346; 37 Sup. 199; 28 Mich. 331.

²³ A religious corporation may acquire title through adverse possession. *Bogardus v. Trinity Church*, 4 Paige, 178. See 4 Sandf. Ch. 633; 12 Wend. 602.

²⁴ Conveyance by tenant in common. See 10 Johns. 166; 12 Id. 448; 13 Id. 406; 3 Paige, 445; 9 Cow. 530.

²⁵ *Jackson v. Wheat*, 18 Johns. 40; citing 10 Johns. 356; 3 Johns. Ch. 129; 6 East, 80. See 99 U. S. 168; 34 Wis. 433; 10 Barb. 256.

²⁶ *Munro v. Merchant*, 28 N.Y. 9. See 8 Cow. 588; 33 Barb. 491.

stranger, constitutes adverse possession.²⁵ Where one tenant in common conveys the whole property when, in fact, he only owned a portion,—*Held*, that the possession of the grantee was adverse to the rightful owners.²⁶ Possession, without claim of title, is not adverse, but is deemed the possession of the owner. The quality and extent of the right acquired by possession of lands depends upon the claim accompanying it. Only to the extent of the claim will the presumption of the law go in favor of the right. Possession, to be adverse, so as to ripen into title when long enough continued, must be accompanied by a claim of title fee. A claim simply of an unexpired term for years is not in hostility, but in accord with the true title.²⁷

Possession twenty-seven years by one tenant in common, although during all that time the right of the co-tenant had not been recognized, was held not to be sufficient to authorize a jury to presume an ouster, where, before twenty-five years had elapsed, the co-tenant had made an actual entry upon the land and was forcibly expelled.²⁸ A tenant in common may oust his co-tenant and acquire title through adverse possession.²⁹

If the claim of adverse possession is under a convey-

²⁵ *Siglar v. Van Ripper*, 10 Wend. 414.

²⁶ *Jackson v. Wheeler*, 10 Johns. 166. See 12 Johns. 488; 13 Id. 406; 3 Paige, 445; 9 Cow. 530.

²⁷ *Bedell v. Shaw*, 59 N.Y. 46. See 9 Johns. 163, note; 44 Cal. 471; 39 Wis. 538; 47 Ind. 25; 60 Mo. 33; 40 Cal. 33; 38 Conn. 513; 36 Vt. 69.

²⁸ *Northorp v. Wright*, 24 Wend. 221. See 7 Hill, 476; cited in 63 N.Y. 473.

²⁹ *Brackets v. Norcross*, 1 Greenl. 89. See 9 Watts, 363; 10 Pick. 161; 18 Ala. 50; 27 Tex. 355; 67 N.C. 160; 13 Me. 337; 46 Ga. 9; 10 N.H. 242; 43 N.Y. 152; 18 Ill. 238; 48 Ind. 367; 15 Ala. 363; 32 Cal. 481; 33 Vt., 195; 10 Mass. 464.

ance, the conveyance must have a grantor and grantee, a description of the lands, and apt words of conveyance, and be properly executed, to convey title.³⁰ The adverse possession must be hostile in its inception.³¹

A purchaser of land is entitled to the benefit of his purchase. And if, after the purchase and before the record of his deed, he has notice of a prior conveyance of the same premises, such notice does not destroy his deed, providing it be first recorded.³² But notice of an unrecorded deed before the purchase destroys the effect of a subsequent deed.³³ When the possession of one party is consistent with the title of the other,—as where the rents of a trust estate were received by a *cestui que trust* for more than twenty years after the creation of the trust, without any interference of the trustee, such possession being consistent with and secured to the *cestui qui* trust by the terms of the deed,—the receipt was held not to be adverse to the title of the trustee.³⁴ Where the occupant acknowledges the claimant's title through a lease, payment of rent, or otherwise, there is no adverse possession.³⁵

The enjoyment of land, or such estate as lies in grant, under such circumstances as indicate that such enjoyment has been commenced and continued under an assertion or

³⁰ *Dufour v. Campane*, 11 Martin, 715. See 4 Martin N. S. 224; 35 Ill. 392; 18 Iowa, 261.

³¹ *Brandt v. Ogden*, 1 Johns. 156; 25 Conn. 321; 29 Conn. 391.

³² *Ely v. Scofield*, 35 Barb. 330.

³³ *Jackson v. Elston*, 12 Johns. 452. See 10 Johns. 457; 4 Wend. 585; 19 Wend. 339; 28 Vt. 364; 8 Vt. 473; 44 Barb. 166; 47 N. H. 532; 46 Me. 438.

³⁴ 69 Mo. 117.

³⁵ See B. & P. 542; 8 B. & C. 717; 2 Bouv. Inst. 2193, 2194, 2351; Bouv. Law Dic. 128.

color of right upon the part of the possessor, is adverse possession.³⁶ An adverse user is such a use of the property as the owner himself would make, asking no permission and disregarding all other claims to it so far as they conflict with the use and enjoyment of the property.³⁷ Adverse possession, uninterrupted and notorious, for the statutory time, under a claim of title in fee, vests the title to the land claimed in the claimant or adverse holder, as effectually as though such title had been acquired by deed.³⁸ Adverse possession is made out by the co-existence of two distinct ingredients. The first is color of title, the second, such possession under the color of title as will be adverse to the right of the true owner: whether these two essentials exist is purely a question of law, to be determined by the court. The facts upon which the claim is founded are for the jury.³⁹ In considering the effects of acts which are claimed to be such an adverse possession as may mature into title, reference should be had to the character of the property and the uses to which it would be ordinarily applied, for the purpose of ascertaining with what mind it was so possessed on the one side, and such possession was permitted on the other.⁴⁰ In this case, *Corning v. Troy Iron Co.*, the court decided that where the plaintiffs allowed their land to remain vacant for many years, its principal value to them being the right of flowing its banks in the use of adjacent water-rights, which use was continuously exercised by them, the fact that the

³⁶ *Campbell v. Wilson*, 3 East, 294; 9 Johns. 174.

³⁷ *Blanchard v. Moulton*, 63 Me. 434.

³⁸ *Wall v. Shindler*, 47 Mo. 282; *Cowp.* 595; 34 Cal. 365; 6 Bush (Ky.) 47; 37 Md. 55.

³⁹ *Baker v. Swan*, 32 Md. 355; 47 Miss. 220; 17 Minn. 361.

⁴⁰ *Corning v. Troy Iron Co.*, 44 N. Y. 577; citing 16 N.Y. 539; 35 N. Y. 113; 47 Barb. 287; 29 Id. 165.

defendant has been suffered during the same time to deposit refuse machinery and temporarily a few loads of stone on the premises, and to pass over them habitually as a convenient approach to its property, there being no inclosure of, or permanent improvements on the premises, is far from sufficient to constitute an adverse possession by the defendant. Under such circumstances, to refuse a submission to the jury of the question of adverse possession is an error.

It is the general rule that every possession of land has the presumption of right in its favor.⁴¹ This is a presumption of law, and may be contradicted or destroyed by proof; but until it is destroyed the possession is adverse to any other claimant. This presumption may be destroyed by proof that the actual occupant has received a lease and that his possession is by virtue of the lease and not by color of title. Or it may be destroyed by showing that he has recognized the true owner by paying him rent, or by allowing the true owner to occupy a part of the premises claimed to be adversely held, or by allowing the true owner to improve the premises, such as erecting buildings thereon.

It may be shown to rebut this presumption of law, that the occupant entered upon the premises without pretending to any claim of right whatsoever; in which case the law adjudges the possession to be in subservience to the legal owner.⁴² Hence a claim of right is necessary, not because it is required by statute but because the want of such a claim is evidence sufficient to destroy the legal presumption that the possessor has title.

⁴¹ *Smith v. Lorliard*, 10 Johns. 338.

⁴² *Jackson v. Thomas*, 16 Johns. 293.

Every possession not in subservience to the title of an other, is adverse, and entitled to the peaceful and benignant operation and protecting safeguards of the statute.⁴³ Wrongful continuation of possession for twenty years after the expiration of a title under which the tenant lawfully entered, constitutes such an adverse possession as creates a bar to an entry, or to an ejectment.⁴⁴ An exclusive possession of one tenant in common of all the land on the side of a line agreed upon between him and his co-tenants, for over twenty years before suit, he paying taxes and exercising other acts of ownership, is a bar to his recovery of such part by his co-tenants.⁴⁵ A person seized in fee simple has a constructive possession of the premises of which he is seized.⁴⁶

The possession of one who has bought land unconditionally, and paid for it under an agreement that a deed shall be made, is adverse to the vendor. Such executed contract is a sale, and not merely an agreement to purchase.⁴⁷ By the law of Wisconsin, occupation under paper title, by mining operations, continuous, visible and notorious, may constitute adverse possession.⁴⁸

To constitute adverse possession, entry must be made with a claim of title and of possession; and, after entry, such claim cannot be enlarged, except by acts equivalent

⁴³ *La Frombois v. Jackson*, 8 Cow. 589. See 3 Conn. 398; 5 Penn. St. 327; 60 Mo. 271; 8 Kan. 409.

⁴⁴ *Parker v. Gregory*, 4 N. & M. 308.

⁴⁵ *Rider v. Mans*, 46 Penn. St. 376.

⁴⁶ *Lamb v. Burbank*, 1 Sawyer, 227. See 17 Minn. 361.

⁴⁷ *Ridgeway v. Holliday*, 59 Mo. 444.

⁴⁸ *Wilson v. Henry*, 40 Wis. 594. When possession is originally taken in subordination. See 63 Mo. 233.

Adverse possession in England. See 2 Bing. N. C. 189; 2 Scott, 276.

to a new entry and a new claim of possession.⁴⁹ The quality and extent of the right acquired by possession of lands depend upon the claim accompanying it. Only to the extent of the claim will the law go to favor the right.⁵⁰

In Connecticut it is said that a claim of ownership is not, as matter of law, an indispensable element of adverse possession. In general, the assertion of title is an important circumstance, as indicating adverse possession, and ouster of the real owner.⁵¹ As a general rule, the possession of one who does not hold the true title only extends to occupancy. There must be a claim to the whole.⁵² Where a party claims title under the Illinois limitation laws he must declare a title directly from a specified source, and by a chain, each link of which is a genuine conveyance.⁵³

In some of the States, by statute, color of title is not essential as a basis for an adverse possession; but in no case can there be a constructive possession of land without color of title.⁵⁴ It does not always require a written indorsement to constitute color of title.⁵⁵ Whatever instrument is relied upon as the foundation of claim of possession under color of title must be one purporting to convey title. A sheriff's deed which lacks a seal may constitute

⁴⁹ *Pepper v. O'Dowd*, 39 Wis. 538.

⁵⁰ *Bedell v. Shaw*, 59 N. Y. 46.

⁵¹ *Johnson v. Gorham*, 38 Conn. 513.

⁵² *Crispin v. Hannavan*, 50 Mo. 536. See 36 Vt. 69; 40 Cal. 33; 27 La. Ann. 596.

Possession under executory contract. See 66 Barb. 366.

⁵³ *Hedges v. Paulin*, 5 Biss. 177; 6 Wait Act. & D. 441.

⁵⁴ *Wells v. Jackson*, 48 N. H. 491; *Jackson v. Berner*, 48 Ill. 203; *Beatty v. Mason*, 30 Md. 409.

⁵⁵ *Cooper v. Ord*, 60 Mo. 420.

a color of title.⁶⁶ A sheriff's deed under a void sale,⁶⁷ or a quit-claim deed may be sufficient,⁶⁸ or a deed which lacks a seal,⁶⁹ or a tax collector's deed.⁷⁰ A written paper purporting to be a will, proved before the proper tribunal may give color of title.⁷¹ But a bond to give a deed on the payment of a price does not purport to convey title, and cannot constitute color of title.⁷² A deed which purports to give complete title may be sufficient to give color of title, although the grantor has in fact only the rights of a mortgagee.⁷³ A conveyance in disregard of his client's interest by an attorney who acquired title for the benefit of his client, not in his own right, may give an innocent purchaser for value, color of title.⁷⁴ The entry of one without color of title may afterwards become adverse, by his acquiring and asserting a claim of title, and may be acquired by a deed of trust, though without notice.⁷⁵

The question of good faith of one who holds by color of title depends upon the purpose with which he has acquired the title or possession. If he knew the title to be worthless when he received it, or that it was in fraud of the owner's rights, then it cannot be said that he holds in good faith. So if the deed discloses facts on its face showing that it was not legally made, or made in fraud,--

⁵⁶ *Kruse v. Wilson*, 79 Ill. 233; *Hamilton v. Boggess*, 63 Mo. 233.

⁵⁷ *Fritz v. Joiner*, 54 Ill. 101.

⁵⁸ *McCanny v. Higden*, 50 Ga. 629.

⁵⁹ See 79 Ill. 233, 65 Mo. 233, *ante*.

⁶⁰ *Rivers v. Thompson*, 43 Ala. 633.

⁶¹ *McConnel v. McConnel*, 64 N. C. 342.

⁶² *Rigor v. Frye*, 62 Ill. 507.

⁶⁴ *Stevens v. Brooks*, 24 Wis. 326.

⁶⁵ *Hardin v. Osborne*, 60 Ill. 93.

⁶⁶ *Hamilton v. Wright*, 30 Iowa, 480. See 40 Iowa, 152.

as where it shows by its face that it was made on a sale for taxes, before the redemption expired,—this will not prevent it being a color of title, but will destroy the presumption of good faith.⁶⁷ Color of title is not necessarily impaired by proof that the holder acquired the title with notice of the defects which prevent it being regarded as a good title, if he is not chargeable with fraud or bad faith.⁶⁸ A decree of partition or of foreclosure may become color of title where a proper party to the action has been in good faith omitted.⁶⁹ A deed from a person having the authority to sell will confer a color of title for the purpose of prescription. In Louisiana if a sheriff has authority to sell land on execution and does sell it, and executes a deed to a purchaser in good faith, the latter may, although informalities in the sheriff's proceedings set up when sold to recover the land, the prescription of five years under the statute of that State.⁷⁰ If an agreement be made with the knowledge of the purchaser, with honest motives, so as to restrict competition at the sale, it does not render the sale invalid.⁷¹ A deed by a husband of a life tenant made after her death was held under peculiar circumstances to be a color of title.⁷² Where a party in possession of land, of which his wife is seized, as heir of an undivided part, takes a quit-claim deed from one of the other heirs who is seized of an undivided fourth

⁶⁷ *Hardin v. Gouvener*, 69 Ill. 140.

⁶⁸ *Russel v. Mandell*, 73 Ill. 136, For color of title under foreclosure, see 73 Ill. 121.

⁶⁹ *Rawson v. Fox*, 65 Ill. 200.

⁷⁰ *Pikes v. Evans*, 94 U. S. (4 Otto) 6. See 105 U. S. 644; 109 U. S. 187.

⁷¹ *Marie v. Garrison*, 83 N. Y. 15. See 46 N. Y. 564; 7 Ad. & El. 25; 94 U. S. 83.

⁷² *Forest v. Jackson*, 56 N. H. 357.

thereof, and who simply released and quit-claimed all his right, title and interest, such deed will constitute good color of title to the extent of the grantor's interest, but no further.⁷³

WHAT IS NOT ADVERSE POSSESSION. The very essence of an adverse possession is that the holder of it claims the right to his possession, not under but in opposition to the title to which his possession is alleged to be adverse. So long as he claims to hold under that title, his possession is not adverse to it, and the statute of limitations does not run.⁷⁴ Ignorance of boundary line by two co-terminous or adjoining proprietors, with an agreement that each should possess to a certain line until the true line is known, is not adverse.⁷⁵

Where one has a right to use land for certain purposes his occupation of it must be presumed *prima facie* to be in accordance with his legal right.⁷⁶ Possession of land which is incidental to the commission of a trespass thereon, such as cutting timber on or the unlawful pasturing of another's land, is not adverse possession, and the true owner may maintain trover against the wrongdoer.⁷⁷ For a person holding in adverse possession to accept a lease from the owner of the title interrupts the running of the statute of limitations. The lease, if not void, creates the relation of landlord and tenant, and during the existence of that relationship there can be no adverse possession by the tenant.⁷⁸

⁷³ *Busch v. Huston*, 75 Ill. 343,

⁷⁴ 6 Wait Act, & D. 445; *Farish v. Coons*, 40 Cal. 33.

⁷⁵ *Irvene v. Adler*, 43 Cal. 559.

⁷⁶ *Mowe v. Stevens*, 61 Me. 292.

⁷⁷ *Austin v. Holt*, 32 Wis. 478.

⁷⁸ *Abby Homestead Association v. Willard*, 48 Cal. 614.

An encroachment upon a highway regularly laid out and established, by putting out a fence, is not adverse possession.⁷⁹

Possession taken by a tenant under a widow of a former owner is not adverse to the heirs of such owner.⁸⁰ And where lands are devised for life to any one person, with a remainder over in fee to another, the possession of a third person under the tenant for life is not adverse within the meaning of the statute of limitations, as against the remainderman, until a right of entry accrues.⁸¹

Mere occupancy of a lot under claim of right, in virtue of a grant which does not embrace it, and made by parties who neither owned nor claimed it, is not enough to defeat a transfer of title, on the ground of adverse possession at the date of the conveyance.⁸² The occasional use of lands, in the customary way, for a particular purpose, although uninterrupted for twenty years, will not be adverse possession.⁸³

An entry upon land once a year for twenty years, and the cutting and removal of grass therefrom by a party who has not enclosed or cultivated it, and where it is no part of a known farm or lot occupied by him, is not sufficient to confer title by adverse possession.⁸⁴ A possession of land is not adverse so as to render thereof void for champerty under the statute unless it be under a claim.

⁷⁹ *McLellan v. Miller*, 28 Ohio St. 488; 46 Ind. 15.

⁸⁰ *Melvin v. Wadell*, 75 N. C. 361.

⁸¹ *Carpenter v. Devon*, 29 Ohio St. 379.

⁸² *Laverty v. Moore*, 33 N. Y. 658.

⁸³ *Trustees v. Kirk*, 68 N. Y. 459. See 14 N. Y. 247; 17 Wend. 564; 54 N. Y. 631; N. Y. Code Civil Pro. § 83.

⁸⁴ *Wheeler v. Spinola*, 54 N. Y. 377. See 10 Barb. 254; 1 Cow. 276, 605.

of specific title.⁸⁵ Possession under license is not adverse.⁸⁶

WHO MAY ACQUIRE ADVERSE POSSESSION. It is a general rule that one who enters into possession of land in subordination to the title of another is estopped from denying that title while he holds under it. Yet a trustee may disavow and disclaim his trust, a tenant may disclaim the title of his landlord, and a tenant in common the title of his co-tenants, and drive the respective owners or claimants to their action within the period of the statute of limitations. So one who has possession of land under an agreement to purchase, which contemplates a continuing of right of possession while the contract is being performed, or an absolute right of possession by virtue of its performance, may on performance deny the title of the vendor and thereafter his possession will be adverse.⁸⁷ He may hold adversely as against all others,⁸⁸ and if after taking possession under a contract he takes a deed from a third party, and openly claims under that, his possession becomes adverse.⁸⁹ If the vendor conveys to another in violation of his contract the first vendee is absolved and may purchase and set up title in himself.⁹⁰

A married woman may acquire land by adverse possession.⁹¹ As a general rule, it may be affirmed that, if

⁸⁵ *Matter of Public Works*, 73 N. Y. 560. See 67 N. Y. 132; 7 Wend. 401; 55 N. Y. 446.

⁸⁶ 73 N. Y. 205; 84 N. Y. 31; 94 N. Y. 323.

⁸⁷ *Catlino v. Decker*, 38 Conn. 262. See 14 Wend. 227.

⁸⁸ *Whitney v. Wright*, 15 Wend. 171.

⁸⁹ *Jackson v. Denn*, 5 Cow. 200.

⁹⁰ *Logan v. Steele*, 7 T. B. Monr. 101. See 22 Wend. 121.

⁹¹ *Clark v. Gilbert*, 38 Conn. 94.

one tenant in common, joint tenant or coparcener shows that he means to hold out his co-tenants and actually exclude them, it is an ouster, and his possession becomes adverse.⁹² Although a tenant in common without claiming adversely to his co-tenant, his possession may afterwards become adverse by claim of title to the whole.⁹³

One who holds land is not precluded from acquiring and holding other lands and retaining the same against one who enters without title.⁹⁴

The rule that one who enters upon real estate under a conveyance in fee, from a lessee who had previously entered as tenant of the lessor, and this relation, having been once established, attaches to all who may succeed to the possession through or under the tenant immediately or remotely, and precludes them from acquiring a title hostile to the title of the lessor, and from originating an adverse possession, applies only where the conventional relation of landlord and tenant exists, and some rent or return is in fact reserved ; it is not applicable to one holding under an assessment lease. An adverse possession may be originated during the running of such a lease, which will ripen into a title twenty years after the end of the term.⁹⁵ A mortgagor or his grantees may repudiate the mortgage and convert his holding into an adverse possession.⁹⁶

In an action by a purchaser of land at an execution sale seeking to make a third party who had previously purchased the land of the execution defendant a trustee

⁹² *Brackett v. Norcross*, 1 Me. 98. See 24 Wend. 587 ; 2 Dev. & B. 97.

⁹³ *Millard v. McMullan*, 68 N. Y. 345.

⁹⁴ *Slaughter v. Fowler*, 44 Cal. 195.

⁹⁵ *Sands v. Hughes*, 53 N. Y. 287, *ante*.

⁹⁶ *Jameson v. Perry*, 38 Iowa, 14.

thereof against his will, his possession must be treated as adverse to that of his vendor, and the possession is taken under the purchase sought to be avoided.^{97 a}

⁹⁷ *Bobb v. Woodward*, 50 Mo. 95.

^a *On who cannot acquire partition*. 41 Md. 81; 34 Barb. 485; 5 Cow. 123; 7 Cow. 323; 22 N. Y. 44; 23 Wend. 531; 19 Barb. 644; 70 N. Y. 303; 4 Johns. 390; 29 Mo. 176; 31 Penn. St. 94; 3 Caines, 188; 1 Black, 150; 7 N. Y. 523; 59 Id. 46; 20 Id. 400; 3 Hill, 513; 16 Pet. 25; 2 Johns. Ch. 30; 3 Sumn. C. Ct. 476; 5 Cow. 483; 68 N. Y. 345; 29 Wend. 451; 10 Ves. Jr. 444; 32 How. Pr. 439; 25 Wend. 389; 11 Hare, 230; 1 H. & N. 225.

Against whom acquired. 11 Ala. 156; 3 Greene, 171; 17 Ves. 87; 2 Vern. 540; 10 Mod. 206; 29 Barb. 319; 2 Conn. 27; 3 Allen, 328; 27 Ga. 159; 51 Me. 301; 24 Tex. 583; 2 Caines, 169; 10 Ohio. 362; 3 Rich. 418; 92 U. S. 343; 16 East, 283; 1 Abb. App. Dec. 27; 5 Bush Ky. 128.

Possession must be actual. 60 Mo. 271; 55 Ga. 44; 39 Cal. 543; 50 Ind. 35; 2 Duv. 14; 41 Cal. 571; 43 Vt. 462; 46 Ala. 335; 38 Tex. 591; 60 Mo. 559.

Must be continuous. 17 U. S. 601; 31 Me. 583; 30 Ark. 640; 66 Mo. 365.

^b In Ohio, knowingly selling and conveying land without having any legal or equitable title, founded on a written contract, devise, descent or deed, with intent to defraud the purchaser, is a fraud, and the party doing it is liable to imprisonment in the penitentiary at hard labor. Statutes of Ohio, 1831, p. 142.

^c In Connecticut, by the colony act of 1727, the seller forfeits half the value of the land; and by the Revised Statutes of 1821, the forfeiture is continued, and applies as well to the buyer as to the seller. In Kentucky, by the chancery act of 1824, every conveyance or contract for the sale of land held adversely, is void, and the pre-existing title of the vendor is not impaired. *Wash v. McBrayer*, 1 Dana, 566; *Redman v. Sanders*, 2 Id, 68. In Massachusetts, the penalty in the statute of 32 Hen. VIII. has never been adopted, though the principle of the common law is assumed, that such a conveyance is void. 5 Pick. 348. In Indiana, such a conveyance is held void at common law. *Fite v. Doe*, 1 Blackf. 127.

Haddrick v. Wilmarth, 5 N. H. 181; *Whittemore v. Bean*, 6 Id. 50; *Stoever v. Whitman*, 6 Binney, 420; *Cressen v. Miller*, 2 Watts, 272; *Aldridge v. Kincaid*, 2 Littell, 393. *Act of Tennessee*,

ADVERSE POSSESSION TENANTS IN COMMON The possession of one tenant in common is generally con-

1805, c. 11. It was held in Kentucky, in *McConnell v. Brown*, 5 Mon., 478; S. C., 4 J. J. Marsh. 112, that the lands of a defendant were not liable to execution, under the act of 1798, whilst in the adverse possession of another. Then came the act of 1828, and afterwards the case of *Frizzle v. Veach*, 1 Dana, 211, in which it was held, that, under the last act, the lands of the defendant, though in the adverse possession of another, were subject to levy and sale on execution, and that the champerty doctrine, and champerty act of 1824, did not apply. The statute against buying and selling pretended titles does not prohibit the sale and purchase of equitable titles. It means legal and not equitable titles. Lord Eldon, in *Wood v. Griffith*, 1 Swanst. 55, 56; *Allen v. Smith*, 1 Leigh, 231.

^e M. 8 Edw. IV. 13, 6; 50 Ass. pl. 2; Fitz. tit. "Champerty," pl. 15; *Mowse v. Weaver*, Moore, 655; *Hawk. P. C. b. 1, c. 84*, tit. "Champerty;" 2 Co. Inst. 563, 564; *Jackson v. Ketchum*, 8 Johns. 479. Mr. Dane says, there is no statute on the subject in Massachusetts, but that champerty is an offense in that State at common law. 6 Dane Abr. 741. § 41. Purchasing an interest in the thing in dispute, with the object of maintaining and taking part in the litigation, is still champerty and an offense. *Tindal*, Ch. J.; in *Stanley v. Jones*, 7 Bingh. 369. Persons having any legal or equitable interest in the matter in dispute, or standing in the relationship of father and son, ancestor and heir apparent, husband and wife, and brothers, are exceptions to the law of maintenance, and may maintain each other's suits. So, persons having a common interest in the same thing by the same title, may unite for their common defense of it. The ancient English statutes under Edward I. reached attorneys as well as others. They reached equally officers and individuals—*nulle ministre le roi ne nul autre*, were permitted to take upon him any business in suit in any court, for to have part of the thing in plea or demand. Every agreement relating thereto was declared void. Lord Loughborough considered the offense of maintenance as *malum in se*, and all agreements tainted with it, even as between attorney and client, are void in equity as well as at common law. *Kenney v. Browne*, 3 Ridgw. P. C. 462; *Wallis v. Duke of Portland*, 3 Ves. 494; *Powell v. Knowler*, 2 Atk. 224; *Stevens v. Bagwell*, 15 Ves. 139; *Wood v. Downes*, 18 Id. 129; *Arden v. Patterson*, 5 Johns. Ch. 48, 49. The courts of equity, upon general principles of

sidered the possession of all the tenants in common, and this presumption will prevail in favor of all until some notorious act of ouster or adverse possession is brought to the knowledge of the others; when this occurs the possession is from that time adverse to the other co-tenants, and will afterwards operate against them.⁹⁸ It is a question of fact whether a tenant in common entered upon

policy, will not permit an attorney to accept anything from his client, pending the suit, except his demand. There would be no bounds, said Lord Thurlow (*Welles v. Middleton*, 1 Cox, 125) to the crushing influence of his power, if it was not so. But it is not maintenance for a person to assign his interest in a debt, pending a suit for its recovery; but if it be purchased to answer a private end, it is maintenance: as where a party agrees to give a stranger the benefit of a suit, on condition that he prosecute it.

2 Roll. Abr. 113; *Harrington v. Long*, 2 Mylne & Keene, 590.

^e New York Revised Statutes. The words of the New York Revised Statutes are, that "no estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power, over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful assent, thereunto authorized by writing." So again, "every contract for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof expressing the consideration, be in writing, and subscribed by whom the sale is to be made, or by his agent lawfully authorized."

Frear v. Hardenbergh, 5 Johns. 272; *Lower v. Winters*, 7 Cow. 263.

^f Anon., 1 Ld. Raym. 182; *Parker v. Stansland*, 11 East, 362; *Evans v. Roberts*, 5 Barnw. & C. 289. The English cases go to very refined distinctions on this subject. Thus, the sale of a crop of growing grass, or of hops, or of turnips, is within the statute, because they were in a growing state, requiring further nourishment; but the potatoes in the case in Barnw. & C. had arrived at maturity, and only remained to be gathered. *Crosby v. Wadsworth*, 6 East, 602; *Waddington v. Bristow*, 2 Bos. & P. 452; *Emmerson v. Heelis*, 2 Taunt. 38.

⁹⁸ *Clymer v. Dawkins*, 3 How. U. S. 674. See 16 Pet. 455.

the estate claiming an exclusive right and ousted his co-tenant or not.⁹⁹ An entry upon and a possession of the whole of the land by one tenant in common, as if it had been his exclusive individual property, and the receipt by him of the rents and profits thereof, without accounting to his co-tenants for any part thereof, or proof of a demand to do so, amounts to an actual ouster.¹⁰⁰ An ouster will be presumed between tenants in common when one in possession refuses to pay rent when demanded by his co-tenant, and claims the whole of the land and has peaceable possession of the same.¹⁰¹ A co-tenant may be ousted by denying or resisting his title.¹⁰²

The peaceable possession of one tenant in common, accompanied with no act which can amount to an ouster, will not be construed as adverse possession.¹⁰³ But where, by some notorious act, he claims an exclusive right, though it be under a title which is void, his possession is adverse and the statute of limitations will run.¹⁰⁴ And an adverse possession against two tenants in common, one of whom is within the saving of the statute of limitations, operates against the other.¹⁰⁵ It has been held that actual possession of land, under a deed which purports to convey the whole thereof, and under an assumption or belief that it does convey the whole, when in fact it gives title to an undivided part only, is not an ouster of the tenants in common who hold the remaining interest in the land.¹⁰⁶

⁹⁹ Cummings *v.* Wyman, 10 Mass. 464. See 30 Conn. 492.

¹⁰⁰ Bigelow *v.* Jones, 10 Pick. 161.

¹⁰¹ Johnson *v.* Taulman, 18 Ala. 50.

¹⁰² Thomas *v.* Pickering, 13 Me. 337.

¹⁰³ Challefoux *v.* Ducharme, 4 Wis. 554.

¹⁰⁴ Jackson *v.* Tibetts, 9 Conn. 241. See 43 N. Y. 152; 9 Ired. N. C. 214; 38 Mo. 561.

¹⁰⁵ Doolittle *v.* Blakseley, 4 Day, 265.

¹⁰⁶ Seaton *v.* Son, 32 Cal. 481.

The mortgage of the whole estate by one tenant in common is not conclusive evidence of an ouster.¹⁰⁷ An acknowledgment by the widow and one of the co-tenants in possession, that the party claiming was the owner of the premises, and that they held under him, is not sufficient to establish an ouster by such a party of his co-tenants.¹⁰⁸

¹⁰⁷ *Hodgman v. Shannan*, 44 N. H. 572.

¹⁰⁸ *Forward v. Deetz*, 32 Penn. St. 69.

CHAPTER VII.

PARTIES.

IT is a general rule that all persons, who may in any way be interested in the lands sought to be partitioned, shall be made parties to the action. This would include all tenants in common, joint tenants and co-parceners who may be the owners in fee of the premises; and it, also, includes those who may be in possession although not interested in the premises as tenants or otherwise, that is, tenants under a lease, or a person who may be growing a crop, or one who has a right to use buildings, or to take wood from the lands, or the right to cultivate a portion of the lands for some particular or ordinary purpose. It, also, includes those who have a lien upon the land, or who may be interested in any mortgage, judgment, or mechanics' lien, or, in fact, any lien that may be actual valid against the premises.

It is true that, like most rules of law, there are exceptions to this rule. If the action of partition is between tenants in common, as remaindermen or reversioners, as the action between remainder and reversioners for partition is wholly and purely between them as co-tenants, and the person or persons who may own the estate that is to be carved out, before the enjoyment of the remaindermen or reversioners of their estate, need not be made

parties to the action, as the action of partition, between remaindermen and reversioners as co-tenants, can in no way interfere with those who own and possess a present estate and they need not be made parties to the action of partition, as they are in no way affected thereby.

A tenant in common of a vested remainder of real estate, though his right to possession is postponed during the continuance of a life estate, may institute proceedings for the partition of land, whether the intervening estate is held as an entirety, or by several as joint tenants, or tenants in common.¹ The plaintiff's testator in his life, a tenant in common with the defendant, T. S., devised his share of the real property held in common to his widow, for life, with the remainder to plaintiff in fee; *held*, that the plaintiff could bring action for partition, during the life of the widow. A remainderman may have constructive possession, which will be sufficient to constitute unity of the right of possession, required to exist in a tenancy in common.² In one case of Blakeley against Calder, the court held that a remainderman, though not actually in possession of the premises, might maintain an action for partition. This case was taken to the Court of Appeals, and the learned judge there, Judge Bowen, delivered an opinion affirming the judgment of the court below, to the effect that the purchaser, at partition sale of the premises, may be compelled to complete the purchase, upon the ground that the remainderman had a right to partition the property. Judge Denio, in the same case, also, wrote an opinion in favor of the affirmation, upon the ground,

¹ *Blakeley v. Calder*, 15 N. Y. 617; citing 8 Cow. 361; 19 Wend. 397; 9 Cow. 530; 5 Den. 385; 11 How. 489; 2 Den. 9; 2 Com. 9 D. 2 Bar. C. H. R. 398.

² *Sullivan v. Sullivan*, 4 Hun, 198.

that the owner of a vested remainder, though not in actual possession, could maintain an action for partition, which opinion was concurred in by three other judges. Justice Potter, in discussing this question, in the case of *Sullivan v. Sullivan*, above referred to says: "Possession of the premises, so as to allow the bringing of an action of partition, is presumed from the allegation in the complaint, that the parties are seized as tenants in common. The seizin of one tenant in common who admits or does not deny the title of his co-tenant, may be considered as seizin of all the tenants. Where there is no visible adverse possession, the entry of one co-tenant is deemed a possession and seizin of all according to the titles. Possession of one tenant in common is possession of all. Hence, I conclude, that constructive possession is sufficient to constitute unity of the right of the possession, required in a tenancy in common. It is, also, urged that the power in a remainderman, having no right of actual possession, until a remote future, to compel a partition or sale of the lands in the actual occupation of other owners who preferred, and whose interest it is to continue that occupation, during the period, that they are entitled to the actual occupation, may be inopportunely or oppressively exercised."

The provisions of a will by which real property is given to "heirs of the body of A, whom she shall leave her surviving," gives to the devisees during the lifetime of A, a vested remainder in fee, liable to open and let in after-born children, and liable also to be divided by the death of any devisee before the decease of A, and one who is entitled to such vested remainder in lands, is in possession of his undivided share, within such meaning of the statute relating to actions for partitions of lands, although

there is a life estate covering the lands, and the life tenant is in possession. Future contingent interest of persons *in esse* may be debarred by the sale in judgment under partition.³ Although remaindermen and reversioners may be made parties defendant in an action for partition, they cannot institute the action, at least as against others not seized in a like estate with them. The right is only given to one having actual or constructive possession of the land sought to be partitioned. A remainderman has neither, but simply an estate to vest in possession *in futuro*. A writ of partition will not lie at the instance of a remainderman seized of an estate subject to the term of the life of a tenant in possession. If the action for partition will lie at the suit of one in remainder, it must be by virtue of the statutes regulating the proceedings for partition. Prior to the Revised Statutes it was well understood that to entitle one to institute proceedings for a partition of lands he must be in the actual or constructive possession of the lands *sought* to be partitioned.⁴ Where the lessee becomes the purchaser of the undivided moiety of the rent and reversion, the lease and rent is merged and extinguished to that portion of the premises; and he is not such a tenant in common of the rent and reversion, with the owner of the other half thereof, as to entitle the latter to a partition of the land during the continuance of the lease. If the owner of the undivided moiety of a lot of land is a lessee of the other half thereof, and the lease has become forfeited by the non-performance of a condition subsequent, the landlord must enter for the forfeiture, or otherwise must obtain posses-

³ Chism *v.* Keith, 1 Hun, 589.

⁴ Sullivan *v.* Sullivan, 66 N. Y. 37. See 56 Id. 226; 12 Id. 519; 11 Vt. 129.

sion of his undivided half of the premises, *before* he can sustain a bill of partition.⁵ A party who has a mere future contingent interest in an undivided share of real estate cannot maintain suit for a partition. A mere reversioner, without the concurrence of any of the owners of the present interest in the premises, has no right to file a bill for partition. But a reversioner is a necessary party, where the bill is filed by a person who is the owner of an undivided share of the present interest in the property. The reversioner is also a necessary party, where the suit is brought by the owner of an undivided share of the premises for life, or any other particular estate in the same, and some of the other parties *owning* the residue of the premises in fee.⁶ Where there is a future devise to children or issue, with a substituted devise in case they die during the precedent estate, the devise vests as soon as a child is born, subject, however, to let in after-born children, and to be divested as to any of such issue who may die during the continuance of the precedent estate.⁷ Where six children, one of whom was an idiot, inherited a lot of land as tenants in common, and, for the purpose of making partition thereof, it was agreed that A, one of the children, should purchase the share of two others, and have the east half of the lot for his portion thereof, and that E, another of the children, should purchase the share of one of the others, and should also take the share of the idiot in consideration of supporting such idiot during his natural life, and that he should have the west part of the lot for his portion thereof, and the conveyances were executed by all the children, except the

⁵ *Lansing v. Pine*, 4 Paige, 639.

⁶ *Striker v. Mott*, 2 Paige, 387. See 1 Sandf. Ch. 202.

⁷ *Smith v. Scholtz*, 68 N. Y. 41.

idiot, conveying the premises, in accordance with the above understanding or agreement; and afterwards, A sold the east half of the lot to T,—*Held*, that as E obtained no title to the idiot's share of the lot, there was no consideration for his agreement to support the idiot; but that T was entitled to an equitable partition of the premises, to which the share of the idiot shall be assigned to her out of the west half of the lot which was conveyed to E by the other heirs. Where a bill is filed by a creditor of a lunatic against his committee to obtain payment of a debt out of the estate, it is not necessary to make the lunatic a party. But in a suit where there are conflicting interests between a lunatic and his committee which must be settled in the case, both may be made parties.⁸ It has been decided that partition suits are embraced within the general provisions of the Revised Statutes relative to the revival of suits; but if a suit for partition is revived against the infant heir, a guardian *ad litem* of the infant must give the same security which would have been required if the infant had been one of the original parties to the suit. If the husband dies pending a partition suit to which his wife is not made a party, the suit can only be revived or continued against the widow, as to her right of dower in the premises, by the original bill in the nature of a bill of revivor and supplement. The purchaser of premises sold under a decree for partition always takes the same subject to the right of dower of the tenants in common, or co-tenants, unless the wife was a party to the suit; but where an actual partition is made, the wife's dower will attach upon the portion of the premises allotted to her husband.⁹ It is a well settled principle of law, that

⁸ *Teal v. Woodworth*, 3 Paige, 470.

⁹ *Wilkinson v. Parish*, 3 Paige, 653.

partition between tenants in common of real property is a matter of right, by the common law, as well as by the statute, where both parties cannot, or either of them will not, consent to hold and use such property in common.¹⁰ The party applying for a partition of lands must not only have a present interest in the premises of which partition is sought, as a joint tenant or a tenant in common, but he must also be actually or constructively in the possession of his undivided share or interest in such premises.¹¹ In the State of New York, it was the intention of the revisers to exclude a party from instituting a partition suit, for the partition of premises held adversely to him, until after he had obtained possession of his share of the premises, or some part thereof, by ejectment or otherwise. In South Carolina an interest may be severed, and the share of each ascertained and set forth, where the subject matter is not susceptible of division. Whether this be just or practicable, is a matter for the commissioners to decide so as to enable the court to make a proper decree. The equitable rights of the parties should appear from the pleadings.¹² The wife of a husband tenant in common is not a necessary party to a suit for partition. Such a suit cannot take away her right of dower. On a partition suit such right attaches to the husband's separate share ; and, if a sale is decreed, the lands should be sold subject to it : unless she will voluntarily release. The partition deed will not convey her right of dower. Neither will any act of the husband, without the consent of the wife, or any

¹⁰ *Smith v. Smith*, 10 Paige, 470. See 1 Ves. & B. 554 ; 3 Fairf. 146 ; *Alnat* on Part. 4, 78, 87 ; 8 Ves. 143.

¹¹ *Burhans v. Burhans*, 2 Barb. Ch. 398.

¹² *Thayer v. Lane*, Walker Ch. 200. See 3 Terms Am. Ch. Dig. tit. "Partition."

misconduct on the part of the wife, bar her right of dower. A decree for partition or sale or real estate will not be granted among heirs while the personal property appears to be insufficient to pay the debts of the ancestor.¹³

An assignee of a deficiency judgment against the executors of the testator on a foreclosure of a mortgage upon real estate, of which the testator died seized, is not entitled to intervene and serve an answer in a partition suit, in which suit the mortgagee was originally a party and appeared, but served no answer.¹⁴ It is irregular for a bill to be filed by a person of unsound mind not so found by inquisition, by the next friend, for the purpose of dealing with the real estate of the person of unsound mind.¹⁵

A court of equity will not compel a purchaser to take a doubtful title as on a bill for specific performance, or a sale on foreclosure of a mortgage. But this rule does not always apply to a sale decreed upon a bill for partition.¹⁶

Some courts have held, and especially in the last case cited, that it is not necessary to make judgment creditors and others, having incumbrances upon the premises, parties to a bill for partition, even where a sale of the premises is decreed, and where they were made parties in such a case by a supplementary bill it was held that the bill should be dismissed, as in the case of *Swan v. Swan*, 8 Price, 518. The action was a bill for partition of premises mortgaged by a common owner to a third person. At a hearing, it was argued for the defendant that the

¹³ *Matthews v. Matthews*, 1 Edw. 564. See 7 Paige, 391; 4 Id. 47; 7 Paige, 411; 22 Wend. 501; 23 Hun, 119; citing 3 Paige, 653.

¹⁴ *Patterson v. McCunn*, N. Y. Weekly Dig. 186; citing 63 N. Y. 438.

¹⁵ *Halshide v. Robinson*, 8 Moak Eng. 918. See 25 & 26 Vict. c. 86, §§ 1, 2, 13.

¹⁶ *Sebring v. Mersereau*, 9 Cow. 344.

mortgagee should have been before the court, as he was a party in interest. But it was decided that the court could not make the mortgagee agree to a partition, because he is entitled to the whole. This decision undoubtedly was correct. But it is hard for one to see, under the present practice, why the mortgagee, or, in fact, any person having incumbrances upon premises, should not be made party defendant to the action. It is true that the mortgage liens, and, perhaps, the judgment liens rest upon the whole property sought to be partitioned. But the purchaser, upon the sale, should know the standing of those holding such liens, and should know the exact position and circumstances governing and controlling the premises bid in by him. Then, if those incumbrancers are not made parties to the action, they might proceed to enforce their liens. In that case, it would multiply expense and costs, and create many difficulties not necessary in such proceedings. And it is assumed to be the late practice that all persons, having an interest or lien in or upon the property of any kind, shall be brought into court, so that the court may adjudicate their claims. It is not to be assumed that the court can compel the mortgagee to receive the money secured to him by his mortgage, before the same becomes due; neither is it to be assumed that the court can compel such an owner of a lien to allow his lien to rest upon any part or portion of the property, or to take any satisfaction of his lien in part of the property. But he has rights in the premises, which the court has power to examine, which all parties to the case have a right to understand, especially the purchaser. And for these reasons, we believe that the latter practice of bringing all persons who have an interest before the court is the proper and better way in such cases.

A tenancy by the courtesy initiate is a sufficient estate in lands upon which to base a partition suit.¹⁷ Where the intestate is seized and possessed of lands which descend to tenants in common, one of them, though not in possession, can sustain proceedings under the statute for partition, the lands being unoccupied. Children of half blood take equally with those of whole blood, and have equal rights with them as co-tenants.¹⁸ The statute of descents of Rhode Island of 1822 enacts "That when any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass in equal portions to his or her kindred in the following terms." It then provides: "If there be no father, then to the mother, brother and sister of such intestate, and their descendants, or to such of them as there be;" and then declares, in the nature of a proviso, that, "when the title to any estate of inheritance as to which the person having such title shall die intestate, came by descent, gift or devise from the parent or other kindred of the intestate, and such intestate died without children, such estate shall go to the kin next to the intestate of the blood of the person from whom such estate came or descended, if any there be." This phrase "of the blood," in the statute includes the half blood. This is the natural meaning of the word "blood," standing alone and unexplained by any context. The half brother or sister is of the blood of the intestate; for each of them has some of the blood of the common parent in his or her veins.¹⁹

¹⁷ *Riker v. Darke*, 4 Edw. Ch. 696.

¹⁸ *Beebe v. Griffing*, 14 N. Y. 235; citing 2 Blacks. Com. 227; 2 *Binney*, 279.

¹⁹ *Gardner v. Collins*, 2 Pet. 56. See 3 *Mas.* 398.

A CESTUIS QUE TRUSTENT. Children are not necessary parties when the trustee is joined. In this case, the defendant's testator died August 29, 1869, leaving a will, made in January of that year, which contained, among others, the following provisions :

“First. I give and bequeath to my son, A. Hammond Hicks, in addition to any sum heretofore given him, the equal undivided half of my lands in Iowa, also my watch, seal and rings ; and I do further give and bequeath to my said son the sum of \$5,000, payable one year after my decease. Second. I give and bequeath to my son, John F. Hicks, the remaining equal undivided one-half of my lands in the State of Iowa, and I do discharge him from all indebtedness to me for the sum heretofore advanced ; and I bequeath to my son, John Frank Hicks, the sum of \$2,000, to be paid to him by my executors when he shall arrive at the age of twenty-five years, with interest from the time of my decease, making the shares of my sons equal in my judgment.” Then followed certain specific bequests, two legacies of \$1,000, and one of \$2,000 ; and then the following provisions : “Seventh. I give, grant, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, not herein effectually disposed of, which I may own at the time of my decease, to Charles Stebbins, Jr., of Cazenovia, in trust for the following purposes, viz : 1st. To apply the interest thereof, or so much thereof as may be necessary, for the comfortable support of my father during his natural life. 2d. Upon and after the death of my said father out of the proceeds of said residuary estate to pay to the Oneida Conference Seminary, located at Cazenovia, the sum of \$15,000, and to pay the balance of said residuary estate, with any unexpended income thereof, if any, to my said two sons, share

and share alike ; and I authorize and empower said Stebbins to sell and dispose of said property herein devised and bequeathed to him in trust at public or private sale, and upon such terms and conditions as he may think best for the purpose aforesaid." He then appointed said Stebbins and two others executors of his will.

In this action, the point is taken, that the Oneida Conference Seminary and the father of Russell F. Hicks are necessary parties. This defense was not raised by the answer. But the court said, that it was enough that the trustee was made a party ; that the legal title was in him, and he represented the interest of the *cestui que trusts*.²⁰ The New York Code of Civil Procedure, section 1534, makes appropriate provisions for the bringing and maintaining of an action for partition by an infant. As a general rule, courts do not encourage such actions upon the part of infants. It has been decided that a suit for partition of lands cannot be maintained by an infant, either separately or jointly with adult co-tenants in common. But the decision was made upon that part of the Revised Statutes allowing tenants in common, or "any one or more of them "being of full age," to apply for a partition in the Court of Chancery. This, of course, was previous to the enactment of the present Code of Civil Procedure of New York.²¹

The subject of infancy in partition will be fully treated in the next chapter, and there, all questions, as far as possible, pertaining to the rights of infant co-tenants, and the practice relative to them in such cases, will be fully discussed. Where lands leased for a term of

²⁰ Scott *v.* Stebbins, 37 Hun, 335; 15 Week. Dig. 97.

²¹ Postley *v.* Kain, 4 Sandf. 542.

years are owned by several persons as tenants in common, both of the rents and of the reversion, a bill of partition may be sustained ; but a sale of the lands, under a decree for the partition, must be made subject to the rights of the lessees, who by the sale, will become tenants to the purchaser of the rents and reversion.²²

Where real estate is sold by a master, or by one appointed by the court for such purpose, under a decree of foreclosure, the purchaser is only entitled to such a title as a purchaser of the premises would receive at a private sale and would be bound to take from his vendor. It is no valid objection to the title, under a decree in partition between the heirs at law of the person who died seized of the premises, that the suit for the partition thereof was commenced within the four years allowed by law for proving and recording a will of real estate, unless there is some reasonable grounds for supposing that the decedent actually made a will which has changed the course of the descent. It is a fatal objection to the title derived under a decree in partition, that the complainant was a *feme covert*, and that her husband was not joined with her as a party to the suit. And where it appeared, from the affidavits on the part of the purchaser, to be a matter of doubt whether the complainant was not a married woman, a marriage in fact having been solemnized between her and a man who claimed to be her husband, the chancellor refused to compel the purchaser to take the title, until the complainant should have established the fact, upon a reference, that the alleged marriage was illegal and void.²³

²² *Woodworth v. Campbell*, 5 Paige, 518.

²³ *Spring v. Sandford*, 7 Paige, 550.

In a petition for a partition, under the statute, it is not necessary to set forth the rights and titles of the several tenants, at large, nor is it necessary to allege the seizin of the ancestor or the person from whom the parties derive title ; but it is sufficient to state, in general terms, that each tenant was seized of his part or share, in fee, or as the case may be, whether such seizin be acquired by inheritance or purchase. A tenant in common of the inheritance may maintain partition, notwithstanding a particular estate is outstanding. And where a partition was made among several heirs, assigning to each his portion of the lands, by metes and bounds, but excepting from each portion a share thereof, as the dower of the widow of the ancestor, it was held valid. The statute relative to partition does not extend to a tenant in dower; but the estate may, nevertheless, be divided among the other tenants, and a partition, so made, is good, though the dower of the widow is excepted and left out.²⁴ But when the husband is seized as joint tenant, or tenant in common of the land, the widow, as her right of dower extends only to an undivided part, is a proper party to a partition among several joint owners.²⁵

An action for the partition of land cannot be maintained, where the parties own separate parcels and are not in possession of any portion of the land described in the complaint, as joint tenants, or tenants in common.²⁶ Yet, in such a case, if the complaint asks not principally for relief, but for such other or further relief in the premises as the court may deem

²⁴ *Bradshaw v. Callaghan*, 8 Johns. 558.

²⁵ *Coles v. Coles*, 15 Johns. 319. Also see 12 Johns. 434; 5 Wend. 341; 16 Id. 52; 6 N. Y. 89; 38 Ind. 428.

²⁶ *Boyd v. Dowie*, 65 Barb. 237.

best, the court may grant relief in case of confusion of boundaries, provided the same is set forth in the pleadings. But one can readily see that if the parties to the action own the land in separate parcels, although there may be a confusion of the boundaries of those respective parcels, those owners are not co-tenants, as each has the title to his parcel in entirety ; and not being a co-tenant or coparcener, there could be no action of partition between them.

A decree for partition cannot be made, unless all persons interested in the premises are made parties to the suit ; and the party applying for a partition of lands must not only have a present estate in the premises of which partition is sought, as a joint tenant or tenant in common, but he must also be actually or constructively in the possession of his undivided share or interest in such premises. Because, if there is adverse possession, valid and succeeding, the only proper course for the court to pursue is to dismiss the bill as having been prematurely filed. Such dismissal should be without prejudice to the complainant's right to institute a new suit for the same; because, as soon as he shall have obtained proper possession of his share or interest in the property, rents or profits of the premises sought to be partitioned, accruing while the lands have been held adversely to the claim of the complainant, even if such rents and profits have been received by one who was a joint owner of the premises with the complainant, are not recoverable upon a bill for partition.²⁷ Whether a tenant in common in several parcels of real estate, in each of which his co-owners are different persons, can bring them all in as defendants in a single suit, and there-

²⁷ *Burhans v. Burhans*, 2 Barb. Ch. 398.

in have partition decreed as to all the property, is a question of practice not yet fully decided by the courts.²⁸

A petition for partition lies only for a person who has a seizin in fact of the premises.²⁹ When the wife of the plaintiff seeking partition of land has an inchoate right of dower therein, she must be joined with him as plaintiff.³⁰ A guardian of a minor, who is a tenant in common with adults, may seek partition.³¹ When a suit for partition is brought by the committee of a lunatic or of an habitual drunkard, the lunatic or drunkard should be joined as plaintiff.³² The grantee of the widow's right of dower in the land may maintain a bill for partition.³³ The heirs of a deceased person, in case they have parted with their interest, can not, their grantees being proper parties to an action for the partition of the real estate of the deceased.³⁴ The executors and devisees of a deceased tenant in common, not seeking partition among themselves, may unite in a bill in equity to have their shares of the land set-off from that of the co-tenant.³⁵ All persons not plaintiffs, who have an interest in the real estate sought to be divided, should be made defendants.³⁶ Persons, claiming to own entire interest in part of the land sought to be divided, have a right to come in and defend, and, if they establish

²⁸ *Darken v. Wallace*, N. Y. Daily Reg. Aug. 9, 1883.

²⁹ *Banner v. Kennebeck Purchase*, 7 Mass. 475; *Edmunds v. Ames Iron Co.*, 24 Conn. 230. See 13 *Pick.* 251; 19 *Wend.* 367; 5 *Den.* 385; 36 *N. H.* 326.

³⁰ *Ripple v. Gilborn*, 8 *Hun.* 456.

³¹ *Zirkee v. McCue*, 26 *Gratt.* 517. See 24 *Mo.* 252.

³² *Gorham v. Gorham*, 3 *Barb. Ch.* 24.

³³ *Morgan v. Staley*, 11 *Ohio*, 389.

³⁴ *Van Derwerker v. Van Derwerker*, 7 *Barb.* 221.

³⁵ *Paige v. Webster*, 8 *Mich.* 263.

³⁶ *Caster v. Stark*, 19 *Ill.* 328. See 6 *Wall.* 280; 1 *Edw. Ch.*

their title, the suit for partition can be maintained.³⁷ Persons who hold incumbrances upon separate undivided shares need not be made parties.³⁸ The heirs as well as the executors must be made parties.³⁹ In Mississippi an administrator need not in general be made a party.⁴⁰ But the administrator of a deceased tenant in common, to whom rents were due from his co-tenant at the time of his death, is the proper party to an action for partition.⁴¹ The wife of a tenant in common may be made a defendant in an action for partition, wherein her husband is plaintiff.⁴² In proceedings by the wife for the partition of her separate estate, the husband should be made a defendant.⁴³ Before dower is assigned, the widow need not be made a party to an action for the partition of real estate, in which she claims dower.⁴⁴ It has often been held erroneous to do so, and the error will not be cured by discontinuing as to her.⁴⁵ At common law the non-joinder of a defendant in an action for partition is a matter for abatement only.⁴⁶

The New York Code of Civil Procedure provides who must be parties.^a

³⁷ *Harmon v. Keeley*, 14 Ohio, 502; 1 Miles, 395.

³⁸ *Lowe v. Holmes*, 17 N. J. Eq. 148; 9 Cow. 344; 77 Penn. St. 151; 24 Ill. 307; 15 Iowa, 361.

³⁹ *Chalon v. Walker*, 7 La. Ann. 477.

⁴⁰ *Foster v. Newton*, 46 Miss. 661.

⁴¹ *Scott v. Guernsey*, 48 N. Y. 106.

⁴² *Roskrans v. White*, 7 Lansing, 468.

⁴³ *Bronson v. Gifford*, 8 How. Pr. 389.

⁴⁴ *Wood v. Clute*, 1 Sandf. Ch. 199; 1 Barb. 560; 5 Johns. 80; 8 Id. 558.

⁴⁵ *Power v. Power*, 7 Watts, 205.

⁴⁶ *Hoxhie v. Ellis*, 4 R. I. 123.

^a Every person having an undivided share, in possession or otherwise, in the property, as tenant in fee, for life, by the courtesy, or for years; every person entitled to the reversion, remainder, or

A purchaser upon a partition sale has a right to require a good title, and will not be compelled to complete his purchase and accept a deed which leaves him to the uncertainty of a doubtful title, or to the hazard of a contest with other parties which will seriously affect the value of the property.⁴⁷ This subject has been referred to before in this chapter, but not in as strong language as by this decision of the New York Court of Appeals. All owners must be brought in, and their rights presented to and passed upon by the court having jurisdiction of the action. Section 451 of the New York Code of Civil Procedure is general in its terms, and applies to all actions in which service by publication is made.⁴⁸ An action for partition or sale of premises was sustained, where it appeared that the plaintiff's interest consisted of being seized in fee simple of certain undivided parts of all the mines, ores, minerals and metals, lying and being upon described premises ; with power to go upon the land to work and raise the same, and the defendant being seized as owner of the residue of said part of the premises and the soil in fee.⁴⁹ Section 1539 of the New York Code of

inheritance of an undivided share, after the determination of a particular estate therein ; every person who, by any contingency, contained in a devise, or grant, or otherwise, is or may become entitled to a beneficial interest in an undivided share thereof ; every person having an inchoate right of dower in an undivided share in the property ; and every person having a right of dower in the property, or any part thereof, which has not been admeasured, *must* be made a party to an action for partition. But no person, other than a joint tenant or a tenant in common of the property, shall be a plaintiff in the action. N. Y. Code Civ. Pro § 1538.

⁴⁷ *Jordan v. Fitz Gerald*, 77 N. Y. 518.

⁴⁸ *Bergen v. Wyckoff*, 11 N. Y. Week. Dig. 570.

⁴⁹ *Canfield v. Ford*, 16 How. 473. Also see 21 Alb. L. J. 174; 7 Lans. 486; 32 Barb. 176.

Civil Procedure provides who may be made parties. This section is discretionary so far as the plaintiff in the action is concerned, but any person not made a party pursuant to section 1539, is not affected by the judgment in the action.^b It is not a misjoinder of actions when the complaint sets up the claim of one of the defendants to a specific lien for moneys paid to extinguish liens on the premises sought to be partitioned, and asks for an account to be taken of such advances. Creditors holding liens, simply as creditors, need not be made parties at the commencement of the suit. And the claims of one defendant may be disputed by either of his co-defendants as well as the plaintiff, and these claims may be tried and settled in a partition suit, if they involve interests in, or liens on the property sought to be partitioned.⁵⁰

Under New York statutes an actual partition or sale under a judgment in partition is effectual to bar the future contingent interests of persons not *in esse*, though no notice is published to bring in unknown parties, and though such future owners may take as purchasers under a deed or will, and not as claimants under any of the parties to the action.

It seems, that independent of the statute, contingent remaindermen, or persons to take under an executory

^b The plaintiff may, at his election, make a tenant in dower by the courtesy, for life, or for years, of the entire property, or a creditor, or other person, having a lien or interest, which attaches to the entire property, a defendant in the action. In that case, the final judgment may either award to such a party his or her entire right and interest or the proceeds thereof, or may reserve and leave unaffected his or her right and interest, or any portion thereof. A person specified in this section, who is not made a party, is not affected by the judgment in the action. N. Y. Code Civ. Pro. § 1539.

⁵⁰ *Bogardus v. Parker*, 7 How. 305.

devise, who may hereafter come into being, are bound by the judgment as being virtually represented by the parties to the action in whom the present estate is vested.⁵¹ But a reversioner is a necessary party, where a bill is filed by one who is owner of the undivided share of the reversion as well as of the undivided share of the present interest in the property.⁵² The wives of the several owners are proper parties, but not necessary parties, except in case where a sale of the premises may be necessary, and in such a case, the party suing may properly make his own wife a defendant. The other defendants have no right to complain of the fact that such a wife is made defendant, instead of plaintiff, if she does not.⁵³

If a male defendant marry, pending the litigation and after a notice of *lis pendens* is filed, whether his wife must be made a party or not is yet a question not fully decided by the courts ; but it would not seem from the general rule governing filing of *lis pendens*, and of the commencement and the revival of actions, that it would be necessary to open a cause of action, after it had been commenced, or rather, to amend the proceedings so as to bring in the wife as a party when the marriage occurred after the full pendency of the action. We have a right to assume, upon the examination of the cases where this question has been before the court, that if the decision rendered by the court had depended upon that question, the decision would have been that it was unnecessary to bring the

⁵¹ *Mead v. Mitchell*, 17 N. Y. 210 ; citing 2 Blacks. Com. 194 ; Calv. on Parties, 48 ; Story Eq. Pl. § 144 ; 6 Sim. 643 ; 7 Paige, 554 ; 1 Edw. 629 ; 2 Hoff. Ch. 161 ; 2 Barb. Ch. 287. See 16 Hun, 133 ; Sup. Ct. Rule 71 ; 48 N. Y. 106.

⁵² *Striker v. Mott*, 2 Paige, 387.

⁵³ *Roskrans v. Roskrans*, 7 Lans. 486.

wife in, in such a case, as a party defendant.⁵⁴ A partition suit is an action for the recovery of real property, within section 452 of the old Code of New York, so that the court may order a person, not a party, but having an interest in the subject, to be made a party by amendment.⁵⁵ By the New York Code of Civil Procedure,⁵⁶ it is discretionary with the plaintiff, and at his election, whether to make a creditor, having a lien upon the undivided share or interest in the property to be partitioned, a defendant in the action. But in case he decides to make such a person a party defendant, he must comply with all the provisions set forth in said section 1540. Persons having a share or interest in the property, whose names are unknown, or where the share and interest of such person are unknown, or where the name be known and the share and interest unknown, and the summons is served upon him by publication, or personally outside of the State, pursuant to a court order for that purpose, there must be a notice subjoined to the summons stating briefly the object of the action and a brief description of the property.⁵⁷ The publication of a summons, in such a

⁵⁴ *Jackson v. Edwards*, 7 Paige, 387, 403. See 26 Wend. 498. See N. Y. Code Civ. Pro. § 1557.

⁵⁵ *Waring v. Waring*, 3 Abb. 246.

⁵⁶ The plaintiff may, at his election, make a creditor having a lien on an undivided share or interest in the property, a defendant in the action. In that case, he must set forth the nature of the lien, and specify the share or interest to which it attaches. If partition of the property is made, the lien, whether the creditor is or is not made a party, shall thereafter attach only to the share or interest assigned to the party upon whose share or interest the lien attached; which must be first charged with its just proportion of the costs and expenses of the action, in preference to the lien. Code Civ. Pro. § 1540.

⁵⁷ Where a defendant having a share or interest in the property is unknown, or where his name or part of his name is unknown, and the summons is served upon him by publication, or without

case, in the ordinary form, is not a substantial compliance with section 1541,—which requires the notice to specify the nature of the action as aforesaid,—and where the summons is served by publication, in the ordinary form, but by such publication, if an attempt is made to bring in unknown owners, the purchaser, under a decree of sale, will not be compelled to complete his purchase, because the title is defective.⁵⁶

the State, pursuant to an order for that purpose, as prescribed in article second, of title first, of chapter fifth of this act, the notice subjoined to the copy of the summons as published, or served therewith, must, in addition to the matters required in that article, state briefly the object of the action, and contain a brief description of the property. N. Y. Code Civ. Pro. § 1541.

⁵⁶ Sandford *v.* White, 56 N. Y. 359. See 21 Wend. 40; 11 How. 277; 2 Abb. 13; Crary Pr. 321; 3 Wait Pr. 535; 23 Barb. 303; 6 How. 157; 7 Lans. 486; 2 Williams Ex. 966; 39 Barb. 516; Willard R. E. 543; 52 N. Y. 579.

CHAPTER VIII.

INFANTS.

THE law protects the person and the property of every minor.¹ The protection which the law gives is to operate as a shield to him to protect him from improper and improvident contracts, but it is not to be used as an instrument for injury to others. An infant is liable upon certain contracts, and certain other contracts are voidable at his will, and the defense of infancy is a defense of which he alone can take advantage, it being personal and for his benefit only.²

If the real estate of an infant be sold, the proceeds are to be deemed real estate, until he arrives at his majority, and in case of his death, such proceeds descend to his heirs as real estate.³

When the infant arrives at his majority, and obtains the proceeds of the sale of his real estate, such proceeds are then deemed as personal property ; and, on his death, they descend to his personal representatives, as such personal property.⁴

¹ Knapp Poor Laws, ch. XV. XVI.

² Bouv. Law Dict. 793.

³ Forman *v.* Marsh, 11 N. Y. 544 ; reversing 7 Barb. 215 ; 11 N. Y. Leg. Obs. 47 ; 16 Barb. 556 ; 47 N. Y. 21 ; 3 Wheat. 563 ; 2 Story Eq. Jur. § 1357 ; 6 Ired. 524 ; 5 Id. 280 ; Edmunds Eq. 296 ; 9 Moak Eng. 743.

⁴ Forman *v.* Marsh, 11 N. Y. 544.

An infant tenant in common or joint tenant has the same rights and privileges as an adult, excepting that he and his property are subject to the protection of the court, and to be controlled by the court as laid down in the statutes. It may be doubtful whether mere articles of agreement in equity will operate as severance of joint tenancy, though the prevailing opinion is that they may. But, when made by an infant, such articles of agreement do not have this effect, and they are voidable at the option of the infant. Courts may intervene, under their rules of protection of the infant and of probity, and carry out such articles of agreement.

Courts have not been in favor of the sale of real estate of a minor, and have not allowed an infant's real estate to be partitioned, or allowed an infant to be the moving party in a partition suit; unless it could be readily shown that it was for the benefit of the infant. The law makes provision for the sale of the real estate of minors by petition and by an order and approval of the court. In some instances, this proceeding is far cheaper and more beneficial than the sale of the same property by proceedings in partition. There are instances, where it is necessary that the infant should be allowed to bring a partition suit.^a This section 1534 has been placed in the Code for

^a An action for the partition of real property shall not be brought by an infant, except by the written authority of the surrogate of the county in which the property, or a part thereof, is situated. The authority shall not be given, unless the surrogate is satisfied, by affidavit or other competent evidence, that the interests of the infant will be promoted by bringing the action. A judgment for a partition or sale shall not be rendered in such an action, unless the court is satisfied that the interests of the infant will be promoted thereby, and that fact is expressly recited in the judgment. New York Code Civ. Pro. § 1534.

the purpose of meeting such necessity, and upon a careful reading of that section of the New York Code, one will see that the court yet retains its common law authority over the property of the infant. A petition must be made, and in that petition the court must be satisfied by proof of some kind that the partition will be beneficial to the petitioner. Sometimes these circumstances may be such that the court will deem it proper to appoint a referee to take evidence as to the facts and circumstances pertaining to the petition of the infant, and report that evidence, together with his opinion as to the propriety of allowing a suit of partition on the part of the infant. It has been held, in such a case, that when the referee reported, "that in his opinion it would be proper to allow said infant to prosecute an action for the partition or sale of the real estate mentioned in the petition," as not being sufficient to warrant the court to order proceedings in such an action.

The report of the referee should show the facts which warrant such conclusion, and such facts should be set forth fully in the report, that the court may judge upon them whether the necessity exist for a proceeding so protracted and expensive as that sought to be instituted by a partition suit.⁵ It has been held that partition will not be ordered upon application of an infant, unless it be made satisfactorily to appear that the interests of the infant require such partition or sale.⁶ The court in allowing an infant to bring a partition suit must appoint a

⁵ Matter of Marsac, 15 How. Pr. 385.

⁶ Lansing *v.* Gulick, 26 How. 250; citing 28 Barb. 343; 11 How. 176; 9 Barb. 366; 16 Id. 556; 28 Id. 633; 17 Id. 157; 22 N. Y. 110; 22 Id. 517; 24 Id. 372; 21 How. 479; 34 Barb. 106; 13 How. 104; Laws of 1852, ch. 277, §§ 1, 2.

guardian *ad litem* for the infant.⁷ A general guardian cannot act, the infant defendant must appear in the action by a guardian *ad litem* who must be appointed by the court. The guardian of a non-resident infant lunatic may properly petition for the appointment of a guardian *ad litem*.⁸ A party intending to commence an action for partition may, before the service of the summons, procure a guardian for the minor defendant to be appointed. When he has filed the bond, and given notice thereof to the party intending to institute such action, he has effectually consented to act as guardian, and accepted his appointment as such. The summons and complaint in such an action should be served upon him as such guardian, and such service is a proper service on the minor whom he represents.⁹ An infant over fourteen may apply for the appointment of a guardian before the service of the summons. As to those under fourteen an appointment before service is at most an irregularity to which objection must be taken within a reasonable time. It is erroneous to allow an infant in proceedings in partition to act by a guardian, unless such guardian gives security for the trust reposed in him, such security to be approved by the court.¹⁰ When, upon the petition of an infant defendant over fourteen, a guardian *ad litem* has been appointed, the order is valid, though no summons had

⁷ A guardian *ad litem* for an infant party, in an action for partition, can be appointed only by the court. N. Y. Code Civ. Pro. § 1535.

⁸ Matter of Stratton, 1 Johns. 509; 10 Id. 486; 14 Abb. 299; 21 How. 479; 26 Id. 250.

⁹ Rogers *v.* McLean, 34 N. Y. 536; 31 How. 279; 11 Abb. Pr. 440; 10 Id. 306.

¹⁰ Athause *v.* Radde, 3 Bosw. 410.

¹⁰ Struppman *v.* Muller, 52 How. 211.

been previously served upon the infant.¹¹ An infant defendant who is a married woman may appear voluntarily in partition, and it is not necessary that her husband should join with her.¹² A guardian is not appointed as is usual in other actions. He can be appointed by the court only, and the appointment of a guardian *ad litem* by a county judge in an action for partition is a nullity.¹³ It has been held that the county judge has power to appoint a guardian *ad litem* for an infant defendant, in such an action brought in the Supreme Court.¹⁴ This is directly adverse to the decision in *Lyle v. Smith and Varsan v. Stevens*, above referred to, 2 Duer. 635, and also against section 1535 of the New York Code of Civ. Pro., which has been enacted since the decision in 25 How.

The petition for the appointment of a guardian must be verified. But the want of a verification to the petition may be supplied after judgment. But it would be unsafe to dispense with the petition altogether, although it has been held, in some instances, that perhaps such verification might be dispensed with.¹⁵ It is not absolutely necessary that the guardian *ad litem* for an infant defendant put in an answer.¹⁶ The omission of such a guardian to file an answer, or give notice of his appearance in the action, will not affect the validity of a judgment that partition be made, especially if an answer be filed by virtue of an order of the court, as of the time when it might have

¹¹ *Varian v. Stevens*, 2 Duer, 635.

¹² *Disbrow v. Folger*, 5 Abb. Pr. 53.

¹³ *Lyle v. Smith*, 13 How. Pr. 103.

¹⁴ *Towsey v. Harrison*, 25 How. Pr. 266.

¹⁵ *Van Wyck v. Hardy*, 11 Abb. Pr. 473; 34 N. Y. 536; 31 How. 279.

¹⁶ *Bogert v. Bogert*, 45 Barb. 121.

been regularly served as a matter of course, though such order be made after judgment be perfected, and such answer be filed *nunc pro tunc*.¹⁷ A variance between the name of an infant as stated in the complaint and the petition for the appointment of a guardian may be disregarded, where such variance is immaterial.¹⁸

The guardian must have no adverse interest to that of his ward, and the title is not defective, if the petition for his appointment fails to state that fact.¹⁹ If no guardian is appointed the decree is irregular, and the error cannot be excused, though the infant has become of age and tenders a release.²⁰ The guardian must be appointed by the court. If appointed by the surrogate, he is not competent to act in the case.²¹

The guardian must give a sufficient bond for the protection of the interests of the infant in the estate to be partitioned.²² The bond must be signed by the guardian himself. If signed by the sureties alone, it would be insufficient.²³ The bond may be amended on application of all the obligors, and on the leave of the court, to be obtained on petition specifying the alterations required to

¹⁷ *Athause v. Radde*, 3 Bosw. 410. ¹⁸ 2 Duer, 635.

¹⁹ 5 Abb. Pr. 53. ²⁰ 2 Edw. 69.

²¹ *Matter of Stratton*, 1 Johns. 509; cited in 10 Johns. 486.

²² *Clark v. Clark*, 14 Abb. Pr. 299; 21 How. 479; 26 Id. 250.

²³ The security to be given, by the guardian *ad litem* for an infant party, in an action for partition, must be a bond to the people of this State, executed by him and one or more sureties, as the court directs, in a sum fixed by the court, conditioned for the faithful discharge of the trust committed to him as guardian, and to render a just and true account of his guardianship, in any court or place, when thereunto required. The bond must be filed with the clerk, before the guardian enters into the execution of his duties; and it can not be dispensed with, although he is the general guardian of the infant. *N. Y. Code of Civ. Pro.* § 1536.

²⁴ *Jennings v. Jennings*, 2 Abb. Pr. 6; 14 Id. 299.

be made, the reasons for them, accompanied with the consent of the sureties, and their agreement to execute and acknowledge the amended bond.²⁴ The bond should be filed before the guardian enters upon his duties, but it may be ordered to be filed *nunc pro tunc* at any stage of the action, or even after judgment and sale. The failure to file the bond is a mere irregularity which is amendable, and does not affect the jurisdiction of the court or the validity of a sale under its judgment.²⁵

Chapter 277 of the Laws of 1852,—authorizing the filing of a guardian's bond after judgment in cases of actual partition,—is an enabling and not a restricting act. It does not empower the court having original jurisdiction to amend an irregularity by ordering such bond to be filed before and after sale, as well as on actual partition. The bond of the guardian *ad litem* of an infant defendant in partition may be made direct to the infant instead of to the People of the State, provided the order appointing the guardian so direct.²⁶ In proceedings in partition, where an infant is interested, a special guardian *ad litem* must be appointed by the court, under the act. It is not sufficient that the notice and petition are served on his testator or other general guardian.²⁷ Service of summons upon a non-resident infant defendant in partition is not necessary, provided the infant voluntarily appear in the action by its guardian *ad litem*; and the insertion of the words "by publication" instead of the words "without the State of New York," in the notice indorsed upon the

²⁴ *Shaw v. Lawrence*, 14 How. 94.

²⁵ *Croghan v. Livingstone*, 17 N. Y. 218; citing 2 *Saund.* 212; 7 *Johns.* 373; Appendix to *McPherson on Infants*; 3 *Gilman*, 435; 18 *Wend.* 513; *Gra. Pr.* 170. See 25 *Barb.* 336.

²⁶ *Thistle v. Thistle*, 66 How. 472; 5 *Civ Pro.* 43.

²⁷ *Sharp v. Pell*, 10 *Johns.* 486. See 1 *Daly*, 300; 1 *Curt.* 459.

summons served personally without the State, under an order of publication, is not a valid objection to title—it is not a jurisdictional question.²⁸

An infant defendant must defend by a guardian *ad litem*. He cannot appear and defend by an attorney, instead of a guardian.²⁹ The plaintiff may make application for the appointment of a guardian for an infant defendant. If the defendant be a non-resident, the application may be made without previous service of the summons or previous notice to said infant defendant. This question was before the New York court of appeals, as follows. Upon the petition of the plaintiff in a partition suit an order was made, as prescribed by the provisions of the Code, appointing D as guardian *ad litem* for certain non-resident infant defendants, unless they, or some one in their behalf, should, within a time specified, after service upon them of a copy of the order, procure a guardian to be appointed, and directing service upon the infants and their father. Service was made as directed, and at the expiration of the time limited, no steps having been taken by or in behalf of the infants, D was appointed such guardian, and duly qualified. The summons was served upon him, and the infants appeared by him and answered. The court held that this was sufficient, both under the provision of the Code and the provisions of the Revised Statutes in reference to proceedings in partition, which are made applicable for partition under the Code; and, it appearing that the court had jurisdiction of the subject-matter, that the sale in pursuance of a judgment

²⁸ 66 How. Pr. 472.

²⁹ Comstock *v.* Carr, 6 Wend. 526. See 60 Barb. 122; 41 How. Pr. 46; 12 Am. R. 354; 47 Miss. 686.

in an action gave a valid title as against said non-resident infant defendants.³⁰

It was argued in this case that the court did not acquire jurisdiction of the non-resident infant defendants, as they were not served with the summons either personally or by publication.³¹ But on the other hand it was argued that the constitution does not positively require personal notice in order to constitute legal proceedings "due process of law." It belongs to the legislature to determine, in the particular instance, whether the case calls for this kind of exceptional legislation, and what manner of constructive notice shall be sufficient to reasonably apprise the party proceeded against, of the legal steps which are taken against him.³² It was also argued that the substance of the proceeding to partition land is not changed by the Code, and the various steps provided by the Revised Statutes are to be taken in the same manner and the like proceedings had, as if the former had not been changed, adapting the same as to the new form.³³ And that it was sufficient to serve the summons upon the guardian *ad litem*, and not upon the infant; and that, the guardian *ad litem* having appeared and answered for the infants defendants, such appearance and answer was equivalent to an appearance by them in the action as absolutely as if they had been of full age and appeared by an attorney. The claim was that the court had jurisdic-

³⁰ *Gotendorf v. Goldschmidt*, 83 N. Y. 110.

³¹ N. Y. Code Civ. Pro. §§ 127, 134, 135, 139; 2 Duer, 635; 5 Abb. Pr. 53; 17 N. Y. 218; 19 Abb. Pr. 161; 11 Id. 440; 34 N. Y. 536.

³² *Matter of Empire Bank*, 18 N. Y. 215; *Schwenger v. Hickok*, 53 N. Y. 284.

³³ *Sandford v. White*, 56 N. Y. 359. See 62 N. Y. 75; 13 How. Pr. 105; 34 N. Y. 542; 2 R. S. 317, § 3; *Roger v. McLean*, 34 N. Y. 542.

tion to pass upon a question of the insufficiency of the proof of title, and having adjudicated upon that question, the judgment was valid, and could not be questioned collaterally.³⁴

The fact that one of the parties interested in the partition of an estate is an infant, or a lunatic, or an habitual drunkard, will not deprive other parties in such interest of their right to a partition and sale of the premises so held in common by them. But, before the interest of the infant, lunatic, or habitual drunkard can be disposed of, and his title vested in a purchaser, he must, in some proper form, be brought before the court, and his rights passed upon and protected. If, in bringing a ward into court, or in the proceedings in court, there has been an irregularity, that irregularity may be cured by subsequent amendment under the order of the court having jurisdiction of the parties and the subject-matter in the first instance.³⁵

Where an estate was granted during the joint lives of a husband and wife, with power to the wife of appointing the fee either by deed or will; and if she die before her husband, without executing the power, the estate to go to her issue; and in default of issue, to her right heirs —she taking the absolute fee, if she survive her husband; it was held, that the wife had a general and beneficial power, within the provisions of the statute, of appointing the fee; that the master's sale under a decree in partition suit would not destroy the contingent interests of her children, and that the only mode of conveying the estate

³⁴ *Blakeley v. Calder*, 15 N. Y. 619. See 18 Id. 355; 47 Id. 404.

³⁵ *Rogers v. McLean*, 34 N. Y. 536; citing 17 Id. 218; 11 Abb. Pr. 444; 6 How. 194.

freed from the children was by deed duly acknowledged, or by last will and testament.³⁶

The interests of the guardian *ad litem* in the action or in the premises sought to be partitioned, should in no way be adverse to that of the infant, and in case the interest of the guardian is antagonistic to the rights of the infant, which fact appears on the face of the proceedings, a sale under such proceedings will be void as against the infant.³⁷ When an infant is a party to the proceedings, the court may decree his conveyances to be binding on him, unless he shows cause against it after arriving of age.³⁸ Where land acquired by a testator after the making of his will is conveyed by him to a child, by way of advances, in making partition it is to be estimated according to its value at the time of its conveyance, and the residue of the real estate at its worth at the time of the testator's death.³⁹

The court has jurisdiction to charge reversionary property of infants with money required for their maintenance, even where some of the infants for whose benefit the money is raised may not ultimately become entitled to possession of the property charged. A security for this purpose approved, with a provision for restoring the money by means of an insurance against the contingency may be ordered.⁴⁰ On an application by an infant for maintenance, the court has jurisdiction, without suit, to charge the expenses of his maintenance and the cost of the applica-

³⁶ *Jackson v. Edwards*, 22 Wend. 498. See 1 Hopk. 436; 2 Paige, 586.

³⁷ *O'Connor v. Carver*, 12 Heisk. (Tenn.) 436; 20 Moak Eng. 665.

³⁸ *Jackson v. Edwards*, 7 Paige, 386.

³⁹ *Toomer v. Toomer*, 1 Smith, 93.

⁴⁰ *De Witte v. Palin*, 3 Moak Eng. 723.

tion on the corpus of a freehold estate to which he is entitled in fee.⁴¹ Where an infant is entitled both at law and in equity to real estate as against another who is in wrongful possession, he is entitled to recover in equity on a bill stating these facts and asking a declaration of title and account, and may join adult remaindermen as co-plaintiffs.⁴²

An infant defendant must, in all cases, appear and defend by guardian.⁴³ The substantial object of this requirement of the law is the protection of the infant, and, in fact, the protection of all persons whom the law sees are incompetent to choose their own attorney, or conduct their own litigations. An infant cannot, in his infancy, waive the defect that he did not appear by guardian.⁴⁴ The irregularity of the appearance and answer of an infant by an attorney, and of the trial and verdict upon an issue found, is an error of fact, for which the courts have set aside the judgment after it had been entered.⁴⁵ If the defendant be of full age at the time he appears and pleads his infancy, he may, of course, appear and plead by an attorney of his own choice ; and it is held that where a defendant has, by his laches, deprived himself of any legal right to set up the defense of infancy to avoid his contract, the court will not aid him.⁴⁶ In Maryland the courts have held that where a judgment was entered against an infant, who appeared by attorney, and not by a guardian, he knowing of its existence, and how it was obtained, and

⁴¹ *In re Howarth*, 5 Moak Eng. 632.

⁴² *Howard v. Earl of Shrewsbury*, 9 Moak Eng. 603.

⁴³ *Knapp v. Crosby*, 1 Mass. 479. See 8 Johns. 418; 6 Wend. 526.

⁴⁴ *Fairweather v. Satterly*, 7 Robt. 546.

⁴⁵ *Maynard v. Downer*, 13 Wend. 575; 14 John. 417; 2 Code Rep. (N. Y.) 128; 51 Barb. 222.

⁴⁶ *Graham v. Pinckney*, 7 Robt. (N. Y.) 147; 44 How. Pr. 423.

taking no steps to avoid it, until six years after he became of age, such delay amounted to laches so as to deprive him of the right to set aside the judgment for irregularity.⁴⁷ Infancy must be specially pleaded.⁴⁸ But in some jurisdictions, it is held that infancy may be given in evidence under the general issue in *assumpsit*.⁴⁹ If, to a plea of infancy, the plaintiff reply denying the infancy, it is incumbent on the defendant to prove his infancy.⁵⁰ An adult cannot plead in abatement the infancy of a co-defendant.⁵¹

⁴⁷ *Kemp v. Cook*, 18 Md. 130.

⁴⁸ *Roe v. Angevine*, 7 Hun, 679; 1 Chitty Pl. 503; 6 Bush, 473; 3 E. D. Smith, 597; 24 Barb. 150.

⁴⁹ *Kimball v. Lamson*, 2 Vt. 138; 38 Id. 494; *Cutts v. Gordon*, 13 Maine, 474.

⁵⁰ *Bortwick v. Carruthers*, 1 Term R. 648.

⁵¹ *Hallam v. Mumford*, 1 Root, 58. See 5 Johns. 160.

CHAPTER IX.

JURISDICTION.

JURISDICTION is given by the law of the sovereignty of the tribunal, and is held sufficient everywhere, at least as to all the property within the sovereignty of the tribunal granting such jurisdiction.¹ It extends not only to property, but to persons upon whom process is actually and personally served within the territorial limits of the jurisdiction, to those persons who appear either personally, or by attorney, and by their pleadings or appearance admit the jurisdiction of the court.² A person may appear, upon whom no process has been served, for the express and only purpose of objecting to the jurisdiction of the court; such an appearance cannot be construed as admitting that the court has any jurisdiction, either of the subject-matter or of the person thus appearing.³ When the judgment of a foreign court is produced by the party here to justify himself in the execution of such judgment in the country in which it was rendered, and it appears that the court rendering it had jurisdiction of the cause, the justification is admitted, and the regularity of the proceedings is not to be drawn in question. But, on the other hand, if the foreign court had no jurisdiction

¹ 2 Blatchf. 427; 27 Mass. 594; 1 R. I. 285.

² 6 Tex. 275; 4 N. Y. 375; 8 Ga. 83.

³ 37 N. H. 9; 2 Sandf. 717.

in the case, the justification will be rejected, without inquiring into the merits of the judgment. The foreign court must have had jurisdiction of the parties as well as of the cause, for its judgment to be entitled to the full faith and credit mentioned in the Federal Constitution.⁴ In partition, usually the question of the jurisdiction of a foreign court will not arise. But, one might die seized of lands in two or more States, and in the settlement of the estate of the deceased, where he died, the question of the jurisdiction of foreign courts might arise upon a division of the property, whether that division should be by partition or otherwise, and the reference to the case of Bissell against Briggs is of interest in this work, only so far as the judgment of a court of one State might be binding relative to the property in that State upon the settlement of the whole estate in another jurisdiction. Jurisdiction must be either of the cause,—which is acquired by exercising powers conferred by law over property within the territorial limits of the court,—or of the person,—which is acquired by actual service of the process upon the individual sought to be brought into court, or his personal appearance in such court. The question of jurisdiction as to property is to be determined according to the law of the sovereignty granting the power to the court. The question of jurisdiction of the person is simply a question of fact,—that is, of personal service or of appearance. The court of general jurisdiction is presumed to be acting within its jurisdiction till the contrary is shown.⁵ The court of limited jurisdiction is one of which the jurisdiction delegated to it by its sovereign power, and a jurisdiction of the

⁴ *Bissell v. Briggs*, 9 Mass. 462.

⁵ 10 Ga. 371; 10 Barb. 97; 3 Ill. 269.

subject-matter, which will appear upon the papers before it in all cases ; and its record must show that its acts are within the power granted it by the sovereign.⁶

It is rarely, if ever, too late to object to the jurisdiction of a court where the want of power to hear and determine appears on the face of the proceedings.⁷ The jurisdiction of State courts over the subject-matter of an action, where it is based upon a contract, or is for the recovery of property where a personal descent depends upon the means by which plaintiff's title was acquired, and a right to property given by act of Congress, may be protected in a State court in the same way, and to the same extent, as though derived from any other source.⁸

The Supreme Court is a court of general jurisdiction,⁹ and, as such, it has jurisdiction of actions for the partition or sale of real and personal property being within its territorial power, but has no power to consolidate two actions for partition, where the subject of one is land situate in one county, and the subject of the other action is land situate in another county, and where one or more of the parties to the one are not parties to or interested in the subject of the other action. In such a case the consolidation does not consolidate. The two actions remain as two actions, and cannot possibly become one.¹⁰ This court has no power, against the objection of the parties in interest, to change the place of trial of a local action which is brought for partition of lands, to a county other than the

⁶ 27 Ala. 291; 26 Mo. 65; 1 Doug. 384; 5 Harr. 387; 28 Miss. 737; 1 Greene, 78; 2 How. 319.

⁷ *Delafield v. State of Ill.*, 2 Hill, 159. See 1 Abb. Pr. 392; 6 Parker, 153.

⁸ *Cook v. Whipple*, 55 N. Y. 150.

⁹ N. Y. Code Civ. Pro. § 217.

¹⁰ *Mayor v. Coffin*, 90 N. Y. 312.

county where the land is situate.¹¹ The Supreme Court, sitting at a Special Term, has all the jurisdiction, both legal and equitable, conferred by the statute on the Court of Chancery and the former Supreme Court in proceedings for partition, and is to conduct the same, so far as they are applicable, in conformity with the provisions of the Revised Statutes. And it does not follow that an action in partition is a suit in equity because it is on the calendar and moved for hearing at the Special Term. It is before the Supreme Court, which may take such action as the condition of the pleadings and proceedings requires; and if there be an issue of fact in the case, upon the result of which depends the title of any of the parties, it becomes the duty, and undoubtedly, the right of the court, to send such issues to a trial by the jury, either upon a settlement of special issues, or on the pleadings themselves; and, after the determination of those issues, so sent for trial to a jury, then, to proceed in the action as provided by the Revised Statutes.¹²

In one case the Supreme Court, in an action for the partition of land, to which all persons having an interest in the land were parties, rendered a judgment directing a sale of the premises. The purchaser at the sale declined to complete his purchase, on the ground that the plaintiff in the action was not in possession nor entitled to the immediate possession of any portion of the land, but was only a tenant in common, with others, of an estate in remainder, after the death of one of the defendants, and that the court consequently had no jurisdiction to enter-

¹¹ *Bush v. Treadwell*, 11 Abb. N. S. 27. See 43 N. Y. 224; 42 Id. 547; 59 Id. 124; 3 Abb. 14; 58 How. 183; 6 Abb. N. C. 69; 3 Law Bul. 66.

¹² *Hewlett v. Wood*, 3 Hun, 736.

tain the action: it was held, that whether a party having a vested future estate in lands, without a present right to possession, is entitled to institute proceedings for partition or not, yet the court having general original jurisdiction of the subject-matter, and jurisdiction of the parties in interest, they were concluded by its judgment, and that the purchaser at the sale under it derived a perfect title.¹³ A judgment in partition is binding upon all parties, though minors or non-residents, if the court acquire jurisdiction of them, and of the subject-matter. And a sale under proceedings is effectual to bar the future contingent interests of persons not *in esse*, though no notice be published to bring in unknown parties; and though such parties, not then *in esse*, may take as purchasers under a deed or will, and not as claimants under any of the parties to the suit.¹⁴ The Supreme Court, as a court of equity, has no inherent original authority to direct the sale of the real estate of infants; and the general provisions of the statute declaring that "No real estate, or term of years, shall be sold, leased or disposed of in any manner against the provisions of any last will, or conveyance by which such estate was devised to such infant," was a prohibition upon the power of the court to decree partition.¹⁵

The Supreme Court has jurisdiction of all actions for partition, and while the proceedings are regulated by statute, it is for the court to determine whether the statute has been complied with, and to decide whether

¹³ *Blakeley v. Calder*, 15 N. Y. 617, *ante*. See 66 N. Y. 37; 11 Abb. N. C. 38; 2 Civ. Pro. 140.

¹⁴ *Clemens v. Clemens*, 37 N. Y. 59. See 60 Barb. 366; citing 24 How. 183; 36 Barb. 88; 24 Penn. St. 242; 3 N. Y. 511; 12 Id. 184; 34 Barb. 156; 29 Id. 650; 3 Sandf. 371; 27 Barb. 272; 35 N. Y. 653.

¹⁵ *Muller v. Struppmann*, 55 How. 521, *ante*.

the case is a proper one to allow partition or sale ; and if the court errs, the error can only be reviewed by exceptions properly taken.¹⁶ If the error has been committed, the review of that error must be upon appeal, and such appeal only brings before the appellate court, such things as were duly excepted to upon the trial in the lower tribunal.¹⁷ No point can be raised in the appellate court, which was not raised and argued in the court below.¹⁸

In Massachusetts, partition may be had upon a petition, and if, upon a petition for such purpose, it appears that the parties claim by descent from the same ancestor, and that advancements have been made to some of the parties, not yet settled in the probate office, the Supreme Court is not thereby ousted of its jurisdiction in the case.¹⁹

The Supreme Court of that State will not sustain an appeal from a judgment of the Common Pleas, accepting the return of commissioners appointed to make partition pursuant to a petition for that purpose.²⁰ A judgment for partition upon a petition, where public notice has been given pursuant to the statute, binds the right of possession of one claiming to own in severalty part of the land described in the petition, and of which partition is prayed for.²¹

A probate judge is not authorized to cause partition of the share of one heir or devisee, leaving the others.

¹⁶ Howell *v.* Mills, 56 N. Y. 226 ; citing 15 N. Y. 617, *ante* ; 47 Id. 21.

¹⁷ Keyes *v.* Devlin, 3 E. D. Smith, 434 ; 26 N. Y. 616 ; 38 Id. 305.

¹⁸ Gelston *v.* Hoyt, 13 Johns. 561 ; 5 N. Y. 136, 492 ; 8 Barb. 351 ; 5 How. Pr. 323 ; 12 Barb. 9 ; 1 Hilt. 161 ; 17 Id. 469 ; 2 Cow. 31 ; 2 Wend. 146 ; 5 Id. 620 ; 4 E. D. Smith, 178 ; 12 Wend. 399.

¹⁹ Bemis *v.* Stearns, 16 Mass. 200.

²⁰ Pierce *v.* Oliver, 13 Mass. 211.

²¹ Cook *v.* Allen, 2 Mass. 462. See 13 Id. 211.

tenants in common ; but he may cause the whole land to be divided among all the heirs and devisees.²² And where a devisee who had conveyed part of his share, prayed that the residue might be set off to him in severalty, and the judge of probate, without noticing the conveyance, decreed that partition be made among the devisees according to the will, the decree was not erroneous on that account. The statute of 1817, chapter 190, section 24, does not bind the judge to divide real estate among heirs or devisees ; and where the estate was small, and the petition of one devisee for partition was opposed by two others wishing to hold in common, the Supreme Court reversed the decree of the judge of probate for partition. The probate court is authorized to make partition of real estate among the heirs or devisees ; but when one of them has conveyed his property, the jurisdiction of that court in the premises is at an end.²³ The judge of probate has no authority to order partition among devisees of a remainder ; although, if it might be construed that he had such authority, it would be limited to remainders which have become vested at the time of the partition.²⁴ A decree of the judge of probate, assigning the whole of the estate of the intestate to an eldest son, on condition that he pay to the other children the value of their respective shares within three months, in money, but without taking security for the same, may be avoided by the other children as not authorized by the statute.²⁵

A decree of the judge of probate allowing the return

²² *Arms v. Lyman*, 5 Pick. 210.

²³ *Pond v. Pond*, 13 Mass. 413.

²⁴ *Wainwright v. Dorr*, 13 Pick. 333.

²⁵ *Newhall v. Sadler*, 16 Mass. 122. See 7 Pick. 209.

of commissioners, dividing an estate among heirs, and assigning the whole to one, that heir paying to the other heirs, respectively, a certain sum, though void as to one of the heirs, who had no notice, was held good as to another, who assented to the assignment, and received the sum awarded to her by the commissioners.²⁶

A county court has jurisdiction of actions for the partition of real property.²⁷ Of course, the general jurisdiction of a county court cannot extend in such cases to land lying outside of the county, in which such court exists, as a county court is a local court, and a court of limited jurisdiction, confined in most instances to actions arising within the county which is the territorial jurisdiction of such court. The statute defining the jurisdiction of the county courts is constitutional, so far as it confers upon those courts jurisdiction in proceedings to obtain partition of land.²⁸ The ordinary actions at law, in use when the statute was framed, cannot be made special cases by calling them so ; but the proceedings to obtain a partition of lands, held in joint tenancy or tenancy in common, are, in a certain sense, special in their character. At the common law there was no remedy for the parties in such cases. The statute of 31 Henry VIII. (chapter 1), which first gave them a remedy, recited that such parties could not make any severance without "their mutual assent and consents." It enacted that such tenants should thereafter have a writ out of the chancery for that purpose. Thus suits for partition become regular actions ; and if the practice of partitioning lands in this form had been continued in the State of

²⁶ *Rice v. Smith*, 14 Mass. 431.

²⁷ N. Y. Code Civ. Pro. § 340, subd. 1.

²⁸ *Doubleday v. Heath*, 16 N. Y. 80.

New York, and if the present form of actions was of that character, one could not see how they could be considered special cases, within the constitutional provision. But the New York legislature at an early day instituted a summary proceeding by petition, which, after being often revised and amended, at length took the form in which it is now found in the Revised Statutes.²⁹

Equity will entertain jurisdiction over partition of incorporeal hereditaments. A court of law is less able to administer complete justice in partition of the former than of the latter, and consequently the partition of incorporeal hereditaments is peculiarly a subject of equity jurisdiction.³⁰ Proceedings for partition are always local proceedings,³¹ and ought not to include a prayer for the partition of lands lying in different counties.³² A court of equity has jurisdiction to partition personal property as well as real, and when justice requires that real and personal estate be sold together, and the proceeds divided, it should be within the province of such court to do so in one action.³³ It is well settled that a court of equity has jurisdiction over an action brought to secure a partition of personal property between tenants in common.

A court of admiralty is not a court of equity, and does not exercise jurisdiction to order the sale of any personal property; as, for instance, a vessel owned by tenants in common, except in those cases where the opposing interests are equal.³⁴ "A court of equity," so says Jus-

²⁹ See 1 R. S. 1813, 50, and foot-note.

³⁰ 5 Wait Act. & D. 82; *Baxter v. Knowles*, 1 Ves. Sr. 494; 1 R. I. 233.

³¹ *Peabody v. Minot*, 24 Pick. 333.

³² *Bonner, Petitioner*, 4 Mass. 122.

³³ *Prentice v. Janssen*, 7 Hun, 86.

³⁴ *Andrews v. Betts*, 8 Hun, 322.

tice E. D. Smith, in 28 Barb. 290, "is incompetent to give relief in such cases, by decreeing the partition of the property, or a sale thereof where partition is impracticable, and a division of the proceeds."³⁵ The case of *Tinney v. Stebbins* was an action in equity for the partition of personal property held by the parties in common.³⁶

Notwithstanding that an action of partition is an equitable action, questions of fact often arise that must be referred to a jury, or, upon consent of the parties, decided by the court or referee, before a judgment for partition or sale can be regularly entered. And where issues of fact are presented by the pleadings, a jury trial is a matter of right.

The Supreme Court at a Special Term has authority to direct issues of fact to be settled, and that the verdict of the jury be certified to the Special Term for further proceedings. And it is within the discretion of the court whether the case be so disposed of or placed upon the circuit calendar. Such actions of fact as are presented by the pleadings, and the exercise of this discretion are not reviewable in the Court of Appeals. The form of such issues is discretionary, and the order of the court settling such issues is not reviewable. If the issues settled are imperfect or insufficient, the court, on trial at the circuit has, in its discretion, the right to amend and to submit such additional issues as the proof may warrant.³⁷ The court of equity had jurisdiction prior to the Revised Statutes, and independent of statute regulations which gave the Court of Chancery the same power, upon bill filed in that court, to decree partition

³⁵ *Tinney v. Stebbins*, 28 Barb. 290; 4 Bibb, 441.

³⁶ See 15 Barb. 334; 22 Id. 517; 2 Lans. 211.

³⁷ *Hewlett v. Wood*, 62 N. Y. 75, *ante*.

and sale of lands, as were given to the common law courts.³⁸ The proceedings under the Revised Statutes in the law courts was by petition, but the Code repealed the statutory proceedings by petition, and substituted an action in their place.³⁹ The fact that the purpose of a feigned issue from the Court of Chancery generally was to inform the conscience of the court upon questions of fact, sent to be tried by a jury, does not affect the right of a trial by jury in partition cases. In partition suits, the verdict of a jury stands upon the same footing, the proceedings on a trial are liable to the same rules, and subject to the same exceptions, as in other actions, and will only be reversed for legal errors.⁴⁰ A verdict cannot be reversed, on error, as being against the weight of evidence ; but it will be reversed for a wrong direction of the court to the jury, on a question of law or the legal result of the evidence. When, in a proceeding in partition under the statute, there is evidence of a possession of twenty years before suit, adverse to the petitioner, the jury should be instructed that, if they find such adverse possession proved to their satisfaction, they should render their verdict for the defendant.⁴¹ A case is not necessarily an equity case because on the Special Term calendar, and if there be an issue of fact in the case, the court may send it to the jury either upon a settlement of special issues or on the pleadings.⁴²

Courts of chancery have concurrent jurisdiction with

³⁸ *Larkin v. Mann*, 2 *Paige*, 27.

³⁹ *Groghan v. Livingston*, 17 N. Y. 225.

⁴⁰ *Clapp v. Bromaghan*, 9 *Cow.* 530.

⁴¹ 9 *Cow.* 530; 4 *Paige*, 178; 15 *Wend.* 111; 2 *Johns. Cas.* 58; 10 *Johns.* 164.

⁴² 3 *Hun*, 736, *ante*.

courts of law in suits for partition of legal estates.⁴³ To enable a court to make a decree of partition, the equitable rights of the parties should appear from the pleadings.⁴⁴ The court will not authorize the guardian of an infant to join in a sale, except on the report of a master that such sale is necessary and proper ; and the guardian must give security for the faithful performance of his trust on such sale, and to bring the proceeds of the infant's share into court, or to invest and account for the same, as the court shall direct. It is a sufficient ground to authorize a sale of an infant's property, and the court has power to make such authorization, when such property is held in common with adults, and that the value of the estate is small, in comparison with the expenses of a partition suit, to which it must otherwise be subjected.⁴⁵ The court will not give a purchaser at a master's sale the benefit of his purchase where he neglects to comply with the terms of sale within a reasonable time, if a resale will be deemed beneficial to the parties.⁴⁶ And a decree of the Court of Chancery finding that a late resident of another State died intestate, with respect to his lands in this State, is conclusive upon all questions of such intestacy.⁴⁷ If there has been an irregularity in bringing a ward into court, it may be cured by subsequent amendment under order of the court having jurisdiction of the parties and of the subject-matter.⁴⁸ The court has power to amend irregular proceedings.⁴⁹

⁴³ Jenkins *v.* Van Schaak, 3 Paige, 242 ; distinguished in 85 N. Y. 434. See 2 Barb. Ch. 405 ; 6 Paige, 293.

⁴⁴ Thayer *v.* Lane, Walker Ch. 200, *ante*.

⁴⁵ Matter of Congdon, 2 Paige, 566.

⁴⁶ Jackson *v.* Edwards, 7 Paige, 386. See 22 Wend. 498 ; 8 Barb. 618 ; 55 N. Y. 7 ; 53 N. Y. 298.

⁴⁷ Clemens *v.* Clemens, 37 N. Y. 59.

⁴⁸ Rogers *v.* McLean, 34 N. Y. 536, *ante*.

⁴⁹ Knapp *v.* Hungerford, 7 Hun. 588.

Parties to an action are bound by the decree of the court, even though it may be erroneous, providing they raise no objection, upon the trial in the court, to those things which the court passed upon that were wrong, even though the case was one in which a court of equity was called upon to exercise its powers.⁵⁰ Persons having an interest in lands sought to be partitioned must be made parties to the action ; and when not made parties, and have no opportunity to be heard in the action, or as to the decree, the court cannot bind them nor afford the relief asked to the other parties in such cases. Courts of chancery will refuse to make a decree where, by reason of the absence of persons interested in the matter, the decree will be ineffectual, or would injuriously affect the interest of the absent parties.⁵¹ In an orphans' court reference should be made to the value and amount of the land rather than the present amount of the income.⁵²

If a bill, besides the usual prayer for general relief, contains a prayer for specific relief, the plaintiff is entitled to other specific relief, so far as it is consistent with the case before the court. But the court will not sustain a bill for a partition, where a title is denied, or is not clearly established ; but a bill will be retained, to give the plaintiff an opportunity to establish his title at law.⁵³ If any doubt arises on a bill for a partition, to the extent of the undivided rights and interests of the parties, the usual course is, to direct a reference to a master to inquire and report on them, as the estate and interest of the parties must be ascertained before a commission is award-

⁵⁰ *Monarque v. Monarque*, 19 Hun, 332.

⁵¹ *Barney v. Mayor of Baltimore*, 6 Wall. 280; 18 Law. Ed. 825.

⁵² *Young v. Bickel*, 1 S. & R. 467.

⁵³ *Wilken v. Wilken*, 1 Johns. Ch. 111.

ed to make partition. But where the title is suspicious, or litigated, it must first be established at law before a court will interfere.⁵⁴ When the legal title is disputed and doubtful, the course is to send the plaintiff to a court of law, to have his title first established. But where the question arises upon an equitable title, set up by the defendant, the court must decide on the title.⁵⁵ The plaintiff has no right to impeach the deed of the defendant, for proceedings in partition are not appropriate for a litigation between the parties in respect to their title, and the court should not allow the equitable proceedings of partition to be used for such a purpose.⁵⁶ Part-owners or tenants in common of real estate, in which partition is asked in equity, have an interest in the subject-matter of the suit, and when the relief is so intimately connected with that of the co-tenants, that if these cannot be subjected to the jurisdiction of the court, the court must dismiss the bill.⁵⁷ Adverse claims to real property cannot be determined in an action for partition. The court has no power to make such determination in such an action. The title of the parties should first be established by the proper action for that purpose, before proceedings for partition can be had.⁵⁸

A judgment in partition under the statute, where part of the premises belongs to owners unknown, is not valid, unless it appear on the face of the record that the affidavit required by the statute that the petitioner or

⁵⁴ *Phelps v. Green*, 3 Johns. Ch. 302.

⁵⁵ *Coxe v. Smith*, 4 Johns. Ch. 271.

⁵⁶ *Doe v. Carpenter*, 18 How. U. S. 297; 15 Law. Ed. 389.

⁵⁷ *Barney v. Mayor of Baltimore*, 6 Wall. 280.

⁵⁸ *Van Schuyver v. Mulford*, 59 N. Y. 426. See 5 Den. 385; 19 Wend. 367; 2 Paige, 387; 3 Barb. Ch. 608.

plaintiff in partition is ignorant of the names, rights or titles of such owners, was duly presented to the court, and that the notice also required in such cases was duly published. The affidavit not being in accordance with the statute, the court lacks jurisdiction in the premises.⁵⁹ The court may affirm any part and reverse any part of the judgment of the court below on appeal.⁶⁰

⁵⁹ *Denning v. Corwin*, 11 Wend. 647. See 21 Wend. 55;
¹⁷ *Id.* 488.

⁶⁰ 8 Johns. 558.

CHAPTER X.

PARTITION WHERE DEVISE HAS BEEN MADE.

THE division of real estate and personal property is sometimes governed by a will which may perhaps separate and divide the estate in respect to the shares allotted to each of the co-tenants or devisees, and give to each, his or her respective share. For instance, A might be the owner of land which was so situated that it could be easily parceled among his children, or those to whom he desired to leave the same : A might make a will wherein he allotted to each that tract or portion of the land, setting forth the metes and bounds, or accurately describing each particular parcel, so that a partition would not be necessary, and could not be had, as the property would have already been partitioned by the devise of A. But, on the other hand, A might make his will wherein he directs that his property, the real estate especially, shall pass to certain heirs or individuals ; but not saying what particular parcel shall pass to any particular heir, although they may not all "share and share alike." In such a case, if the co-tenants could not agree as to how the land should be disposed of, or how it should be divided among them, then a partition must necessarily be had, or else a sale of the premises under the rules and

regulations of the proper court having jurisdiction. But if A, in the making of his will, should direct that trustees or appraisers be appointed, or, perhaps, appoint them by his will, and that such appraisers or trustees shall divide and parcel off the lands among the co-tenants or devisees, then a partition would be unnecessary, as the testator has already by the provisions of his will so regulated the matter that litigation is unnecessary between the co-tenants. A might, on the other hand, direct that his executor have power to sell, or, perhaps, that his executor should sell within a certain period of time named in the will, in which case it would be unnecessary, unwise and improper for the co-tenants to attempt to partition the land, as the power of sale lies with the executor, and cannot by an act of the co-tenants be taken from him so long as the will is valid. In partition cases, courts have heretofore had to construe wills, or clauses in wills, because often the main portion, or at any rate a part of the will, might be invalid and void, and yet the remaining portion of the will might be legal and carry out the intent of the testator. That portion of the will which purports to convey property, either real or personal, or both, might perhaps be construed by the court to be invalid, would certainly affect the division of the property, whether it be by an actual partition or by a sale, and then a division of the proceeds. For instance, a will might be made conveying property to different individuals, and then entailing that portion conveyed to some certain individual so as to make the conveyance void under the laws of the United States, or of any State, yet leaving all the other devises of property in the will legal, then the court must construe the rights of those parties interested in the property, as it is set forth by the will, and especially that

part of the will, where the devise is void, or claimed to be void. Section 1537 of the New York Code of Civil Procedure,^a provides, that a person claiming to be entitled, as co-tenant, by reason of his or her being an heir of a person who died, holding and possessing real estate, may maintain an action for the partition thereof, whether he is in or out of possession, notwithstanding the devise made of such property to another by the testator who is in possession, providing that the devise be void, and in such a case must allege and establish that the so-called devise in the will transferring the property to the one in possession is void.

The court, at General Term, in New York State, passing upon questions such as we have discussed, said : "In this case, the plaintiffs claiming the land by descent as heirs at law commenced this action for a partition. They alleged in the complaint an apparent devise by their father by will, which was void, and also a adjudication upon the will declaring it to be so. The paragraphs containing these statements were, on motion, stricken out as irrelevant. This was erroneous, and, it seems, would not have been done had there not existed some misapprehension of the nature of the action. The statute (3 R. S. 6 ed. p. 60, § 22) provides that any heir or heirs claiming lands from an ancestor may prosecute for partition thereof, notwithstanding any apparent devise

^a A person claiming to be entitled, as a joint tenant or a tenant in common, by reason of his being an heir of a person who died, holding and in possession of real property, may maintain an action for the partition thereof, whether he is in or out of possession, notwithstanding an apparent devise thereof to another by the decedent, and possession under such a devise. But in such an action, the plaintiff must allege and establish that the apparent devise is void. New York Code of Civ. Pro. § 1537.

by ancestor or any possession held in under such devise, provided that such heir or heirs shall allege and establish in the same suit, action or proceeding that such apparent devise is void. The statement of this provision demonstrates the error of the order made. It was essential to the plaintiff's case that they should aver the existence of the devise and its invalidity, and they did so. The defendant McCloskey was not called upon to answer that part of the complaint, unless the plaintiff's title as heirs at law in fact was disputed. His part of the case is separate and independent, and relates exclusively to the validity of the deed under which he claims."¹

In an action for the partition of lands, where the complaint failed to state in explicit terms that the plaintiffs, who claimed title to the lands as heirs at law of a decedent in possession, were themselves in possession of their shares, or held the premises as joint tenants or tenants in common, the court held, that the allegations of this complaint setting forth such alleged facts were insufficient, as the complaint should conform, in its statements, to what was required to be set forth in a petition for partition under the Revised Statutes ; that the rights and titles of the plaintiff should be fully set forth. Where one seeks to avail himself of a remedial statute he should, in pleading, bring himself within its terms by clear, distinct, affirmative allegations. To justify an action for partition of lands, the same must be held, and be in the possession of several persons, as joint tenants, or tenants in common. The revisers did not intend to relax the statutory common law rule, which they regarded as established ; and they were of the opinion, undoubtedly, that actual or

¹ *Voessing v. Voessing*, 12 Hun, 678,

constructive possession was necessary. The plaintiff in his action must comply with the old statutory rule, that his complaint must show possession, excepting as set forth in section 1537 of the New York Code of Civil Procedure, and that section assumes that if the apparent devise therein referred to is void, that the plaintiff then is in possession, and, if not in actual he is in constructive possession. So that in bringing an action under that section of the Code, all the facts, necessary to show the proper possession on the part of the plaintiff, must be pleaded, otherwise the pleadings do not show that the court has jurisdiction of the action. The averments above referred to, do not explicitly state that the plaintiffs are in possession of their shares, or that they hold the premises as joint tenants, or tenants in common, with others. And for those reasons the court held, that the complaint was insufficient.²

The action, in the case of *Stewart v. Munroe*, was not brought under chapter 238, of the Laws of New York, 1853, "relative to disputed wills." By section 2 of that act, the heir, claiming lands by descent from an ancestor, who died holding and being in possession of the same, whether the heir be in possession or not, may prosecute for the partition of the lands thereof, notwithstanding any apparent devise by such ancestor. The complaint in this case contained no allusion to the fact that Mr. Stewart left a will, yet it is well known that Mr. Stewart did not die intestate.³ And from the fact that Mr. Stewart did die testate, this case becomes of

² *Stewart v. Munroe*, 56 How. 193; citing 9 Cow. 530; 66 N. Y. 37; 52 How. 62; *Moak Van Santv.* Pl. 235; 2 Blacks. Com. 199; 4 Kent Com. 393; 46 N. Y. 182; 2 Barb. Ch. 398; 3 Paige, 245; 14 N. Y. 235; 5 Wait Pr. 61, 63.

³ *Bailey v. Hilton*, 14 Hun, 31.

interest, when carefully read under the subject now in discussion.

An action for partition of lands, under the act of 1853, can only be sustained, when it is shown that the apparent devise, to which objection is taken, is void. It is, however, only when the whole will, or entire devise of real estate, is attacked for invalidity, that a suit or proceeding can be instituted under the act above referred to. Although an heir at law of the testator, who takes nothing under his will, cannot, when objection is made, maintain an action for its construction, yet where, in such an action, all the parties interested under the will, and in the estate, agree upon the facts, and ask for an adjudication, it may be granted.⁴ In an action for partition brought by an heir under the provisions of the act of 1853 [chap. 238], relative to disputed wills, the Supreme Court at Special Term has authority to direct issues of fact to be settled and that the verdict of the jury thereon be certified to the Special Term for further proceedings. If the issues settled are imperfect or insufficient, the court, on trial at the circuit, has, in its discretion, the right to amend and to submit such additional issues as the proof may warrant; and the verdict of the jury is conclusive and cannot be disregarded.⁵ Persons, not experts, after testifying to facts and incidents, in relation to a testator, tending to show soundness of mind, or the contrary, may testify to the impression produced upon them thereby, and also whether the acts and declarations testified to seem to them rational or irrational; but they may not as to the general

⁴ *McKeon v. McKeon*, 57 How. 349. See 63 N. Y. 221; 55 How. 301, 210.

⁵ *Hewlett v. Wood*, 62 N. Y. 75, *ante*; 3 Hun, 736; 9 Cow. 530.

soundness or unsoundness of mind of the testator ; or as to his capacity to execute a will.⁶

In 1879, the General Term of the Second Department decided a case of considerable interest at this point. The statement of facts as set forth in the head-notes, in brief, are these : In 1864, one Monarque died, leaving a will, by which he devised certain real estate to his wife for life, and, on her death, to his four children, for their lives, and after their death to their respective children, in fee. In 1876 one of the children of the testator brought an action in the Supreme Court for the construction of the will, alleging certain portions thereof to be invalid. The widow, who was also the executrix, the other three children, and all the grandchildren, were parties, the adults appearing by attorneys and the infants by guardians *ad litem*, duly appointed. In this action it was adjudged that certain portions of the will were invalid, and that the fee vested in the three children of the testator, subject to the life estate of the widow, and that the grandchildren had no interest therein. Subsequently the action, which was before the General Term as above referred to, was brought to partition the real estate, the widow and children being made parties, but not the grandchildren. Upon a motion to compel the purchasers who had bought at a sale under a decree therein, to complete their purchase, the General Term held that the Supreme Court had jurisdiction of the action brought to procure a construction of the will ; that as no objection was made to its hearing and deciding the same, the parties thereto, including the infant grandchild, were bound by the decree, even though it

⁶ *Hewlett v. Wood*, 55 N. Y. 634. See 34 N. Y. 190; 36 Id. 276; 42 Id. 270; 17 Id. 340.

was erroneous, and whether the case was one in which a court of equity was called on to exercise its powers or not.⁷ Under chapter 238 of the Laws of 1853, above referred to, an heir-at-law may maintain an action for the partition of lands, whereof his ancestor died seized, and to procure a judgment declaring invalid and void a devise contained in his will, under and by virtue of which his widow is then in the possession and occupation of the lands, claiming title thereto. The act of 1853 cannot be held unconstitutional on the ground that it allows the question of title to be tried in an action for partition, as a party thereto may, if he so desires, have the issues arising therein settled and tried by a jury on making a timely demand therefor.⁸

An heir-at-law or next of kin claiming in hostility to a will, cannot maintain an action to obtain a construction thereof. The jurisdiction of courts of equity to pass upon the interpretation of a will is incidental to that over trusts. They do not take jurisdiction of actions brought solely for that purpose, or where legal rights only are in controversy. A party who has an interest in a trust created by the will, if valid, cannot allege the trust for the purpose of giving the court jurisdiction while denying the legal existence of the trust and claiming legal rights inconsistent therewith; to entitle him to the action and judgment of the court, either in execution of the trust or in the construction of the will and the adjustment of the rights of the parties under it, he must elect to take in

⁷ *Monarque v. Monarque*, 19 Hun, 332, *ante*. See 63 N. Y. 460; 6 Robt. 219; 2 N. Y. 498; 10 Paige, 193.

⁸ *Ward v. Ward*, 23 Hun, 431; 62 N. Y. 78; 1 Hun, 478; 13 Hun, 306; 11 Abb. Pr. N. S. 104; 47 Barb. 263; 58 N. Y. 335.

subordination to the will and under the trust as created.⁹ The heir at law of those in whose favor devises and bequests are made in a will, cannot maintain an action in equity for its construction; nor can those who claim in opposition to the dispositions of the will. Their remedy is legal, not equitable.

Thus, where the testatrix and her two grandchildren were lost in a shipwreck, and it appearing that a wave bore the testatrix from the saloon in which the children were with her, and she was not afterwards seen alive, the grandchildren were seen alive a few minutes afterwards, when the saloon and its inmates were carried away: it was held, that while from such facts it cannot be said to be absolutely certain that the testatrix died first, yet under the case of *Pell v. Ball*, 1 Cheves Eq. (S. C.) 99, the evidence might justify such conclusion. But the burden of proving a survivorship rests upon the parties who claim through it.¹⁰ If a testator leaves one half of his estate to his widow, the other half to his children, the widow and some of the children may unite in proceedings for partition against the others.¹¹ Where a will directs an appraisement of the land, and a partition of the land among the heirs, according to such appraisement without taking any legal proceedings, the heirs will be entitled to a partition, upon failure of the executors to cause a partition to be made pursuant to the will. The executors and devisees of a deceased tenant in common, not seeking partition among themselves, may unite in a bill in equity,

⁹ *Chipman v. Montgomery*, 63 N. Y. 221; 26 Barb. 68; 1 Cox, 392; 2 Bradf. 90; 5 Mad. Ch. 351; 2 Beav. 215; 10 Paige, 194; 33 N. Y. 602; 8 Id. 67; 52 N. Y. 12; 25 Wend. 124.

¹⁰ *Stinde v. Ridgway*, 55 How. Pr. 301.

¹¹ *Chouteau v. Paul*, 3 Mo. 260.

to have their share of the land set off from that of the co-tenant.¹² And, if a son be devisee of an undivided half of his father's land, the widow, who is devisee of a life estate of the son's portion, is entitled to partition.¹³ Where there is a devise of land subject to a condition, and the devisee having entered fails to perform the condition, a person who has a right to an undivided interest in the land, as co-tenant in common with the devisee, by reason of the breach of the condition, cannot have partition, without first establishing his title by action.¹⁴ The heirs as well as the executors must be made parties to a bill for partition.¹⁵

Where an estate is vested under a will in a trustee, upon several independent trusts, one or more of which are valid and the others void, the latter will be rejected and the estate of the trustee will be upheld to the extent necessary to enable him to execute the former.¹⁶ If some of the provisions of a will are valid and others void, it must be sustained so far as is necessary to give effect to those provisions that are valid.¹⁷

Where a will gives to the executor the power of sale, and the will is assumed to be valid by the court, and has been duly admitted to probate, that power cannot be disputed, and the executor in making the sale can give as good a title as his testator had at the time of his decease; and it is a presumption that the executors sign-

¹² *Page v. Webster*, 8 Mich. 263.

¹³ *Ackley v. Dygert*, 33 Barb. 176.

¹⁴ *O'Dougherty v. Aldrich*, 5 Den. 385.

¹⁵ *Chalon v. Walker*, 7 La. Ann. 477, *ante*.

¹⁶ *Van Schuyver v. Mulford*, 59 N. Y. 426, *ante*; 47 Id. 389; 41 Id. 328.

¹⁷ *Post v. Hover*, 33 N. Y. 593. See 13 Wend. 178; 9 Paige, 107; 35 N. Y. 340; 36 Id. 543; 41 Id. 321.

ing the deed were all of the acting executors, and that they by signing such deed conveyed title. This presumption remains until it is removed by proof, and a purchaser at a judicial sale cannot institute proceedings upon a perfect record of title, as the court must take estates as they find them, and the disposition of estates in general is no more or less than a disposition of the interest and title which the deceased had at the time of his death.

NOTE.—Questions of the kind discussed in this chapter have often been before the courts collaterally or otherwise, where the decision of the court has been based upon circumstances governing the case, and the following will be found of interest to the reader. 22 Hun, 488; 11 Abb. N. C. 309; 4 Edmunds, 504; 47 Barb. 305.

CHAPTER XI.

THE COMPLAINT.

THE first pleading, in partition cases, is the complaint.¹ In New York State, and, in fact, in nearly all States, where the Code practice is in use, this first pleading is termed the complaint. But in some States it is termed the writ, in others, the petition, and in all, to a greater or a less extent, the bill. It should contain the title of the action, and the name of the court and the county or district in which the action is held. Care should be taken as to the venue, as in many instances, an improper venue may oust the court of its jurisdiction of the subject-matter of the action. The complaint should contain a plain and concise statement of all the facts necessary to explain fully the cause of action of the plaintiff, and the right of each of the parties; and it should close with a demand for judgment of partition, or for a judgment for the sale of the premises, providing a partition cannot be had, and a division of the proceeds, after the payment of the necessary costs and expenses that are incurred, by reason of the action, and for such other, further or different relief, as the plaintiff may desire, which may not be inconsistent with the facts set forth in the complaint, and would not be a mis-joinder

¹ N. Y. Code Civ. Pro. § 478.

of actions, or asking for a relief that is in no way germane to the questions to be placed before the court, or inconsistent with any of the matters that may be usually litigated in partition cases. The general rules governing a complaint, as set forth by the New York Code in all actions, should be complied with in partition cases. These rules may be found printed in the Code of Civil Procedure, at section 481, and are of that conciseness, and so plain and simple, that they cannot easily be misunderstood, and yet should be carefully read and fully followed.² No better guide need be had in drafting the complaint, in a partition case, than the rules laid down in the New York Revised Statutes (vol. 3, p. 584, 6 ed. § 8), which states that: "The petition for a partition or sale of any such real estate shall contain the following matters: first, it shall particularly describe the premises sought to be divided or sold; second, it shall set forth the rights and titles of all persons interested therein, so far as the same are known to the petitioner, including the interest of any tenant for years, for life, by the courtesy or in dower, and the persons entitled to the reversion, remainder or inheritance after the termination of any particular estate therein, or every person who, by any contingency contained in any devise, grant or otherwise, may be or become entitled to any beneficial interest in the premises; and, third, it shall be verified by affidavit.³ Section 9 provides that every person having any interest as aforesaid, whether in pos-

² 9 How. 198; 10 How. 31; 15 Abb. N. S. 24; 45 N. Y. 166; 3 Daly, 430; 59 N. Y. 156; 10 N. Y. Leg. Obs. 281. See Wait's Code, note to § 142; 10 Hun, 299; 75 N. Y. 1; 66 N. Y. 214; 3 Civ. Pro. 202; 83 N. Y. 14; 7 Civ. Pro. 210.

³ 7 Paige 387; 28 Barb. 342; Hopk. 501.

session or otherwise, and every person entitled to dower in such premises, if the same has not been admeasured, may be made party to such petition.⁴ Section 10 further provides, in case any one or more of such parties, or the share or quantity of interest of any of the parties, be unknown to the petitioner, or be uncertain or contingent, or the ownership of the inheritance shall depend upon an executory devise, or the remainder shall be a contingent remainder, so that such parties cannot be named, the same shall be set forth in such petition.⁵

The common-law writ of partition is very ancient, as is, also, the jurisdiction of courts of equity in cases of partition. It can be traced back as early as the reign of Queen Elizabeth, which reign, though filled with much evil, brought forth some good, by changing and amending some of the arbitrary statutes and laws then in force, which tied up and curtailed individual rights. The birth of partition was mainly for the purpose of settling differences between coparceners, and not allowing a division of property, or of the proceeds of property between co-tenants; that is an after-thought of the better condition of law and of mankind. And, as far as is now known, no writ of partition would lie, except between coparceners, until the reign of Henry VIII., one of the notorious bad kings of England.⁶

In Massachusetts and Maine, the writ of partition at common law is not only given, but partition may be effected by petition without writ.⁷ In Massachusetts, the petition may be addressed to the Court of Common

⁴ 2 N. Y. 250; 1 Barb. 506.

⁵ 17 N. Y. 217.

⁶ Story Eq. tit. "Part."

⁷ *Mussey v. Sandborn*, 15 Mass. 155; Act of Maine, 1821.

Pleas, or the Supreme Judicial Court. The Probate Court may also award partition as between heirs and devisees upon proper petition.⁸ In Connecticut, New Jersey, Ohio, Illinois and Georgia partition of lands in joint tenancy, tenancy in common or coparcenary, may be effected by petition to the courts of law, and in Connecticut, the Court of Probate has jurisdiction to order partition in the case of minors, and to order a sale in the case of minors for reasonable cause. In England, the proceedings are in chancery, and the jurisdiction of chancery is well established by a long series of decisions.⁹ In some of the States the writ of partition, modified and regulated by statute, is used either wholly or concurrently with other modes of partition. In other States, the proceeding is by petition to the proper court, or by application to commissioners specially authorized; and where no remedy is provided by statute, or the remedy at law is insufficient or imperfect, relief may be had by a bill in equity.¹⁰ It has been a much-discussed question what rights a plaintiff must show to entitle him to maintain proceedings for partition. The Revised Statutes of New York provide that when several persons "shall hold and be in possession of any lands, tenements or hereditaments as joint tenants, or as tenants in common," any one or more of them being of full age may apply for partition. The language of that provision, which has now substantially become a part of the Code of New York State, has been judicially construed as being substantially the provision of the first English act relative to partition between co-tenants and corresponds with the

⁸ See Mass. Rev. Stat. 1836, part 3, tit. 3, c. 103.

⁴ Kent Com. 365.

¹⁰ Wait Act. & D. 82.

statutory provisions of most of the other States. In several States, it is expressly provided that the estate claimed shall be in possession, and not in remainder or reversion. If any special meaning is to be understood by the words "and be in possession," in the New York statute, it would seem to indicate an estate in possession, as distinguished from an estate in remainder or in reversion.¹¹ Every thing that is required by the law to be specially proved should be averred. But it is not necessary to aver in the bill, that the complainant is in possession of the premises, as that fact will be presumed from the allegation that the parties are seized in common.¹²

The judgment in an action for partition is binding and conclusive upon all the parties, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and had decided, as incident to or essentially connected with the subject-matter of the litigation within the purview of the action, either as a matter of claim or defense. It is for the court to determine therein whether it is a proper case for a partition or sale, and if it errs, the error can only be corrected on appeal.¹³ The better judgment of the court in some cases seems to be that possession must be averred. And where the complaint fails to state in explicit terms that the plaintiffs, who claim title to the lands as the heirs at law of a decedent in possession, were themselves in possession of their shares, or held the premises as joint tenants or tenants in common with others, such complaint was insufficient, as it should conform,

¹¹ Bingham's A. & D. 131.

¹² Jenkins *v.* Van Schaack, 3 Paige, 242, *ante*; Dist. 85 N. Y. 434. See 2 Barb. Ch. 405; 6 Paige, 293.

¹³ 46 N. Y. 182; 9 N. Y. 502; 72 Id. 518; 58 Id. 176.

in its statements, to what is required to be set forth in a petition for partition under the Revised Statutes, which require that the "rights and titles" of the plaintiff should be set forth.¹⁴ The estate of each known owner must be stated, but it may be stated that certain definite portions belong collectively to owners who are unknown. An averment that there are "certain unknown owners," although their exact interests are not specified, may be sufficient to authorize the subsequent proceedings as to them.¹⁵ The purchaser at a partition sale cannot refuse to take title on the ground that the pleadings do not correctly or sufficiently state the interest of the parties, nor that the referee did not append searches to his report, for this is now unnecessary; nor that he did not advertise for liens, if he certified that no liens existed.¹⁶ It is the duty of the complainant in a partition suit to state in his bill the rights and interests of all the parties in the premises, so far as they are known to him, according to his information and belief. If the rights of the defendants, as between themselves, depend upon the validity of a will under which an undivided part of the premises is claimed, or where the ownership of an undivided share of the premises is contingent or doubtful and depends upon the construction of such will, it is proper for the complainant to state in his bill the fact of the making of the will and the substance thereof so far as it is necessary to enable the court to understand the rights of the parties. Whatever a complainant is bound to state in his bill, the defendant may be required to admit or deny by his

¹⁴ *Steward v. Monroe*, 56 How. 193, *ante*.

¹⁵ *Hyatt v. Pugsley*, 23 Barb. 285.

¹⁶ *Noble v. Cromwell*, 3 Abb. Ct. App. Dec. 382.

answer to the same.¹⁷ The word "seized," in general, means fee. When an averment in the complaint states, that the party named is seized of a certain portion of the premises, the courts will construe that language to mean that he has that portion of the premises in fee.¹⁸

In a petition for partition, under the statute, it is not necessary to set forth the rights and titles of the several tenants, at large; nor is it necessary to allege the seizin of the ancestor or person from whom the parties derive title; but it is sufficient to state, in general terms, that each tenant was seized of his part or share, in fee, or as the case may be, whether such seizin be acquired by descent or purchase.¹⁹ It is the better wisdom to state distinctly and fully the rights, titles, interests, liens, claims or demands of each and all the parties concerned, notwithstanding the rule laid down in *Bradshaw v. Callaghan*. If a full statement is made of all the interests of the respective parties, the pleader is upon the safe side of the practice. The facts and circumstances in one case, in brief, are as follows: The petition of the plaintiffs, after setting forth their rights, stated that F, one of the defendants, was seized in fee of a moiety, subject to two mortgages, to A and C, and to P; the other defendants, F and P, pleaded in bar, that before the presenting of the petition of the plaintiffs, A and C assigned their mortgage to P. A and C pleaded *non tenent insimul*; the plaintiff replied, confessing all the facts in the pleas, and prayed judgment of partition; and then gave notice of motion for judgment on the pleadings. The defendants

¹⁷ *Cortlandt v. Beekman*, 6 Paige, 492.

¹⁸ *Lucet v. Beekman*, 2 Caines, 385.

¹⁹ *Bradshaw v. Callaghan*, 8 Johns. 557. See 9 Cow. 530; 15 Johns. 321; 2 N. Y. Leg. Obs. 408.

afterwards put in general demurrers to the replication; but the court, upon the pleadings, gave judgment as prayed for by the plaintiffs.²⁰ It is doubtful, whether the same rule would now be applied by the court. This was in 1807.

A bill in equity to determine and settle a disputed legal title, and for a partition of the land, is multifarious; and the same will not lie when the legal title is in dispute, or when it depends on doubtful facts; and when one is filed and the pleadings or proofs show a dispute about the legal title of the real estate, the usual course is for the court of equity to retain the bill until the title is settled by law.²¹ A co-tenant asking aid of a court of equity for a partition against an owner who has made improvements upon the property is entitled to relief only upon condition that any equities thereby arising shall be taken into account.²² Where a complaint was framed to present a cause of action in favor of the plaintiff under the statutes of the State of California, allegations directed to the statement of the legal right of the plaintiff to maintain the action were indispensably necessary.²³

The Supreme Court has jurisdiction of all actions for partition, and while the proceedings are regulated by statute, it is for the court to say whether the statute has been complied with or not. One having a vested remainder (subject to a life estate) in an undivided half of certain premises, brought an action for partition. All the parties interested were made parties. The case was tried

²⁰ *Murray v. Fitzsimmons*, 2 Johns. 482.

²¹ *Chapin v. Sears*, 18 F. R. 814.

²² *Ford v. Knapp*, 1 N. Y. S. R. 362; citing 62 N. Y. 75; 3 *Paige*, 546; 3 Ed. Ch. 323; 2 Sand. Ch. 64; 10 Barb. 592; 8 Price, 518; 48 N. Y. 106.

²³ *Canbeis v. McDonald*, 2 N. Y. S. R. 130.

at Special Term, and judgment rendered directing a sale of the premises. No findings of law or fact were made, and no exceptions appeared in the case, save exceptions filed after the judgment, to the "judgment" and "decree." The Court of Appeals held, that the exceptions presented no question for review, and the only question which could be considered was as to the jurisdiction of the Supreme Court to entertain the proceedings; that the court had jurisdiction of the parties and subject matter, and whether it erred or not in determining whether the case was a proper one for partition or sale, it could not be considered in the Court of Appeals.²⁴ This is, undoubtedly, a wise rule of law. At this time, its interest here is from the fact that it leads us to the further rule, that if the complaint is not proper, and does not of itself show that the court has jurisdiction of either the subject-matter or of the parties, and that the complaint does not allege those averments that are made necessary by the statute, that the time to object to them is not in the appellate court, but before it leaves the court in which the trial is held.

A suit in partition is a proceeding "in rem;" and the jurisdiction of the court is confined to the subject-matter set forth in the petition.²⁵

It is a practice and custom that pleadings may be amended within a proper time, if the facts and circumstances arising after the preparation and service of the pleadings indicate that an amendment should be made. The courts have been liberal in this practice, and have almost invariably allowed the amendments to be made.

²⁴ *Howell v. Mills*, 56 N. Y. 226, *ante*.

²⁵ *Corwithe v. Griffing*, 21 Barb. 9.

This is not only applicable to cases in partition, but to all other actions at law. If the interests are incorrectly described, it is competent for the court to amend the record and give judgment according to the rights of the parties ; but the Supreme Court cannot do so on writ of error, where the jury in the court below found a verdict against evidence.²⁶ An error in the description of the interests of the parties may be amended.²⁷

The complaint, in a partition suit, is not bad for a misjoinder of actions, because it sets up the claim of one of the defendants to a specific lien for moneys paid to extinguish liens on the premises sought to be partitioned, and asks for an account to be taken of such advances. Creditors holding liens, simply as creditors, need not be made parties at the commencement of the suit. But the claims of one defendant may be disputed by either of his co-defendants as well as the plaintiff, and these claims may be tried and settled in a partition suit, if they involve interest in, or liens on the property sought to be partitioned.²⁸ Defendants not having answered the complaint, cannot be required to account for rents, if the complaint do not specifically ask such relief.²⁹ The Supreme Court cannot amend by consolidating two actions, where part of the land lies in one county, and part lies in another, and where the parties defendants are different, as this would be a misjoinder of causes of action.³⁰ The defendant should not

²⁶ *Thompson v. Wheeler*, 15 Wend. 340; citing 17 Johns. 221; *Allinant on Part*. 75; 17 Ves. 552.

²⁷ *Noble v. Cromwell*, 26 Barb. 475; 6 Abb. 59. See 3 Abb. Ct. App. Dec. 382.

²⁸ *Bogardus v. Parker*, 7 How. 305, *ante*.

²⁹ *Bullwinker v. Ryker*, 12 Abb. Pr. 311; 1 Barb. 500; 4 Paige, 336; 2 Barb. Ch. 398.

³⁰ *Mayor v. Coffin*, 90 N. Y. 312, *ante*.

be compelled at all times to account, even though the complaint may make that demand.³¹ The remedy by an action, for rents, by one tenant in common against another, is cumulative, and does not bar the equitable adjustment of them on a partition in equity. The rents on a partition are a lien upon the shares or interest of any tenant from whom they may be due. Where rents were due from one tenant in common at the time of the death of another, the administrator of the latter is a proper party to an action of partition, as he is entitled to receive the rents due his intestate at the time of his death.³² But to bring the question of rents before the court, there must be an accounting, and it is not a mis-joinder of causes of action to ask that there be an accounting of the rents and profits of the land. It has been held that a tenant entering under a person claiming the whole in severalty, is not entitled to the value of his improvements from the person recovering as co-tenant.³³ This is, undoubtedly, a wise and well-established rule of law. The courts of Maine, in passing upon a question as to improvements in a case where the following facts appear: the legal title to land was in defendant's wife, and the equitable interest in the plaintiffs, except a portion of a certain value, to be assigned to her by a master,—*Held*, that a barn erected on the premises in controversy, during the pendency of the suit, became a part of the realty, and, it not appearing that it was erected by the wife, was properly included in the appraisal by the master of the premises set off to the plaintiff.³⁴

³¹ *Ford v. Knapp*, 31 Hun, 522. See 60 Barb. 163; 48 N. Y. 106; 18 Hun, 153; 13 Moak Eng. 650.

³² *Scott v. Guernsey*, 48 N. Y. 106, *ante*.

³³ *Jackson v. Van Denberg*, 2 Caines, 301.

³⁴ *Samson v. Alexander*, 67 Maine, 523.

Where the defendants in partition pleaded *non-tenant insimul*, on which issue was joined ; and it appearing that A, one of the defendants, had, before the service of the petition and notice, conveyed all his right in the premises to one of his co-defendants, who was before a tenant in common with him; the court, after the rights of the parties had been ascertained, by the verdict, refused to turn the plaintiffs to a new action, on account of a variance between the petition and proofs, as to the quantity of interest in the respective tenants in common ; but gave judgment that as to A the plaintiffs should go without day, and pay his costs ; but that as to the other defendants, the plaintiffs should have judgment, on the verdict, according to the proofs in the cause.³⁵

When one or more of the defendants are infants, the complaint should aver that the lands therein described are the only lands owned in common by the parties, as required by Rule 78 of the Rules of 1876. Where the complaint fails in this respect, the allegations are defective, because of their uncertainty, and the remedy is by motion, and not by demurrer.³⁶ In this case, the court remarked that it was clearly the intention of the pleader to conform to the rule, and perhaps logically he did so. But it would seem, from a careful examination of the case, that the complaint was defective, as it did not place the court in a position where it could amply protect the interests of the infant or infants as the law requires.

The right of dower attaches at the time of the marriage, and cannot be defeated by the alienation of the husband alone.³⁷ So that, although the marriage may

³⁵ *Ferris v. Smith*, 17 Johns. 221.

³⁶ *Moffatt v. McLaughlin*, 13 Hun, 449, *ante*.

³⁷ 1 *Cruise Dig.* 136.

have occurred after the seizir, the rights of the wife or of the widow, as the case may be, of the tenant in common shall be explicitly and fully set forth, and the court should know by the pleadings and proof in what part or portion of the land she has either a right or an inchoate right of dower. The widow's dower should be first assigned, and a division then be made of the residue; and, if she has married again, she and her husband should be made parties.³⁸ Where the court assigned the reversion of the widow's dower to one of several heirs, it was held that the decree was void, and that the other heirs were entitled to partition, even after the expiration of forty years from the date of the decree.³⁹ In such a case the complaint in the subsequent action of partition should set forth said assignment, and all the facts and circumstances under which the same was made, together with such allegations as are required under the statute and Code. This is necessary to give the court in which the action is brought jurisdiction of the subject-matter.

The proper time for filing notice of pendency of action for partition, is at the time of the filing of the complaint. The notice of pendency becomes a part of the records in the case along with the complaint; and if the plaintiff omit to file any of the papers necessary to the judgment, he may be allowed to file them *nunc pro tunc*, and the purchaser is not "compellable" to take title until such papers are properly filed.⁴⁰ It is generally conceded that until the filing of the complaint the notice of *lis pendens* is of no validity. But in an able opinion delivered by

³⁸ *Kurtz v. Snead*, 12 Gratt. 260.

³⁹ *Sumner v. Parker*, 7 Mass. 79.

⁴⁰ *Waring v. Waring*, 7 Abb. Pr. 472.

Justice Ingraham, the nature of which is appended to the case of *Waring v. Waring*, just cited, it would seem that if, after the filing of the notice of pendency, the complaint is then filed, that the complaint gives to the *lis pendens* the full force required of it by law. The filing of the notice of pendency does not affect subsequent purchasers or incumbrancers, until the complaint is filed, though the action may be commenced by actual service of process, and the filing of such notice before the action has been commenced is a nullity.⁴¹

Where, in an action for partition, all necessary parties were joined, any error in stating the interests and shares of the parties, or any omission of stating what on motion the plaintiff might have been compelled to insert by way of amendment, is not an irregularity which can affect the title. The purchaser is not to be discharged because of the plaintiff's omission to allege in the complaint that there are no other parties in interest or incumbrancers than those joined, or the referee's omission to annex to the report the searches. If there are other incumbrances, the burden is on the purchaser, who asked on such grounds to be discharged, to point them out.⁴² Rule 65 of the New York Court Rules is as follows: "Where several tracts or parcels of land lying within this State are owned by the same persons in common, no separate action for the partition of a part thereof only shall be brought, without the consent of all the parties interested therein; and if brought without such consent, the share of the plaintiff may be charged with the whole costs of the proceedings; and, when infants are interested, the petition shall state whether or not the parties own any

⁴¹ *Burrough v. Reiger*, 12 How. 171.

⁴² *Noble v. Cromwell*, 6 Abb. Pr. 59.

other lands in common." Rule 66 provides, that where the rights and interests of the several parties, as stated in the complaint, are not denied or controverted, if any of the defendants are infants or absentees, or unknown, the plaintiff, on an affidavit of the fact, and notice to such of the parties as have appeared, may apply at a Special Term for an order of reference, to take proof of the plaintiff's title and interest in the premises, and of the several matters set forth in the complaint ; and to ascertain and report the rights and interests of the several parties, in the premises, and an abstract of the conveyances by which the same are held. Such referee shall in all cases be selected by the court.

Where a plaintiff undertakes to set forth the facts which constitute his title, he will fail unless the facts are sufficient to clothe him with the title asserted ; and the facts specially pleaded control, and not the general averments. Ordinarily, an action for partition does not present the question of title, but the pleadings may be so framed as to present that question, and they must be good upon the theory on which they are drawn.⁴³

In Indiana, the widow takes the one third of the husband's real estate in fee simple under the statute, with the descent cast by law, and the children have no interest in it until after her death, whether she be the first, second or subsequent wife, and they inherit from her ; and in the case of a childless second or subsequent wife, their right and title by descent from her will not be good if by a judgment in partition at the suit of the widow, as such judgment, when it operates upon titles, only affects pres-

⁴³ *Spencer v. McConagle*, 5 West. R. 663. See 71 Id. 422 ; 72 Id. 428 ; 97 Id. 458 ; 102 Id. 352 ; 103 Id. 27 ; 106 Id. 73 ; 104 Id. 592 ; 6 North-eastern R. 920, 912 ; 5 Id. 74 ; 91 Ind. 96 ; 104 Id. 13.

ent and not after-acquired titles. An averment in such a case for partition that the widow was the owner in fee simple of the undivided one third of the real estate, was in the statutory sense true, and did not raise the question of the right of the children to inherit from the widow the portion that might be set off to her.⁴⁴

⁴⁴ *Thorp v. Hanes*, 5 Western R. 845. See 10 Ind. 566; 86 Id. 527; 91 Id. 511; 41 N. Y. 113; 9 N. J. Eq. 702; 10 Pick. 391; 101 Ind. 481; 97 Id. 27.

CHAPTER XII.

THE ANSWER.

THE action of partition will lie whenever two or more persons hold and are in possession of real property as joint tenants, or tenants in common, in which either of them has an estate of inheritance, or for life, or for years. The property is to be partitioned in accordance with the respective rights of the persons interested therein, and to be sold if it appears that a partition thereof cannot be made without great prejudice to the owner.¹ The object of this rule is well established as the law governing the division of real property among co-tenants, when application for such division has to be made to the court, and inasmuch as there can be no false construction placed upon this rule by the intelligent practitioner, the answer should never be interposed, unless there is an actual defense. It often occurs that an answer will be interposed, which in substance admits the various allegations of the complaint, and closes with a prayer asking the same relief that is asked by the plaintiff in his complaint, and for costs. It is evident that such an answer can only be put in for one of two purposes: the first, is to hinder and delay the plaintiff in procuring the relief which he is

¹ *McCall Real Prop.* 256.

entitled to, and demands ; the other, for the purpose of procuring for the defendant, or his attorney, a bill of costs for the performance of services which are absolutely worthless. The answer should set forth such things as a defense, which, if proven, would be an actual defense to the allegations, or, at least, the material allegations of the complaint. The plaintiff in his first pleading may set forth some allegations relative to the interests, share or claim of some fellow co-tenant, or some defendant who is interested in the premises, and not a co-tenant, in such a way that the rights of such fellow co-tenant or defendant are placed falsely before the court ; then an answer is necessary to protect the interests and rights of the defendants who are attacked, or whose position is wrongfully stated in the complaint ; and again, the complaint, in alleging what the plaintiff claims to be his rights, may claim more than rightfully belongs to the plaintiff, and thus place his fellow co-tenant upon the defense ; again, is an answer necessary that the defendants may receive the rights to which the law entitles them. Frivolous answers should not be allowed. Neither should frivolous matter be alleged, or mixed with matters that are proper for a defense, as such things incumber the case and take up the time of the court, delay the rights of those who are seeking such rights in the courts, and enlarge the cost and expenses of the litigation.

Pleading has been defined to be “ the statement, in a logical and legal form, of the facts which constitute the plaintiff's cause of action, or the defendant's ground of defense ; it is the formal mode of alleging on the record, that which would be the support or the defense of the parties in evidence.”²

² 1 Wait Act. & D. 44.

The old suit in equity for the partition of lands is now merged in the civil actions under the Code, and, as such, may be prosecuted by summons and complaint. It is a regular proceeding, inasmuch as it is prosecuted by and against regular parties, and according to the same forms of proceedings and rules of practice with other actions under the Code.³ Therefore, the same general rules of pleading are to be applied that are applicable in other cases ; and, so far as the answer is concerned, it must be plain, concise and not verbose, as the more simple and plain the allegations are made the better it is for the parties interested. It must contain either of the following :

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

2. A statement of any new matter constituting a defense or counter-claim, in ordinary and concise language, without repetition.⁴ Under a general denial in an answer, the defendant has the right to give evidence controverting any facts necessary to be established by the plaintiff, but cannot prove a defense founded upon new matter.⁵ To entitle a purchaser to the protection of a court of equity as against the legal title or prior equity, he must not only be a purchaser without notice, but he must be a purchaser for a valuable consideration actually paid ; he must have paid the purchase-money or some part thereof, or have parted with something of value upon the faith of such purchase, before he had notice of the prior right or

³ *Myers v. Rasback*, 4 How. Pr. 82 ; 2 Code R. 13.

⁴ 4 N. Y. Code Civ. Pro. § 500.

⁵ *Weaver v. Barden*, 49 N. Y. 286.

equity. To avail himself of such an innocent purchase, he must set forth such purchase, and the circumstances surrounding the same, fully in his answer.⁶

Section 519 of the New York Code of Civil Procedure requires, that the allegations of any pleading shall be liberally construed. This is, undoubtedly, the general rule of law, both where the Code practice is in vogue or the practice of common law. But this has been held to apply only to the matters of form of the pleading. Notwithstanding the liberal construction which the courts are willing to place upon the pleadings, it is still the duty of a party to present a clear, unequivocal statement of his cause of action or defense ; and when a material statement is susceptible of two meanings, the one most unfavorable to the pleader must be taken. While it is competent for the opposite party to move to make the pleading more definite and certain, he is not bound so to do ; this burden may not be cast upon him by the fault of the pleader. An instance of this rule is, where the answer contained three defenses, separately stated. The first, alleged that the injuries complained of in the complaint were caused and contributed to by the injured party. The second, set up a settlement and compromise of the claim. The third denied "each and every other allegation" in the complaint not before specifically "admitted, qualified and denied." The court held, that the answer did not put in issue the allegations of the complaint ; that the denial was not such a denial of the allegations as to make either a general or special issue.⁷ Where the complaint is in general denied, it is not suffi-

⁶ See 36 Hun, 423; 7 How. 36; 1 N. Y. 86; 24 Id. 74.

⁷ Clark *v.* Dillon, 97 N. Y. 370.

cient for the defendant to deny such portions thereof as are not otherwise admitted or avoided, the Code not having provided for such mode of pleading. Accordingly, where the answer contained admissions and specific denials of various allegations of the complaint, and, with respect to the others, added that the defendant "denies each and every allegation in said complaint contained, not hereinbefore admitted or avoided,"—*Held*, that such form of denial was not authorized by section 500 of the Code. The denial, if in general, must be specific; the purpose and intent of the Code being to oblige the few making the denial to direct his answer to the particular allegations intended to be controverted, and to do it in such a manner that the court and the opposite party can see at once upon what issue is intended to be taken.⁸ A denial of each and every material allegation of the complaint is open to a motion to make it more definite and certain.⁹ And so also is one that denies each and every material allegation in said amended complaint contrary to or inconsistent with any of the allegations in the foregoing answer not heretofore admitted, ignored or denied.¹⁰ An answer alleging that "the defendant denies each and every allegation in the complaint contained, and not hereinbefore specifically admitted or denied, or not hereinbefore specifically admitted or avoided," is neither general or a specific denial.¹¹ A denial in the alternative

⁸ *Miller v. McCloskey*, 1 Civ. Pro. 252; citing 66 N. Y. 334; 70 N. Y. 126.

⁹ *Mattison v. Smith*, 19 Abb. Pr. 288; 1 Robt. 706.

¹⁰ *Hammond v. Earl*, 5 Abb. N. C. 105.

¹¹ *McEncroe v. Decker*, 58 How. 250.

^a As to denials generally, see 58 How. 274; 9 Abb. N. C. 379; 38 N. Y. 137; 48 How. 82; 46 N. Y. 688; 44 Id. 565; 33 Id. 83; 38 Id. 423; 5 Week. Dig. 477; 20 Barb. 344; 13 How. 112; 15 Abb.

form is defective and open to a motion to make it more definite and certain.¹² A conjunctive form of denial is bad.¹³ Under the Code system of pleading, an answer must either deny allegations found in the complaint, or state new matter; and it seems that the proper mode for making an admission is by silence.¹⁴ Where a denial is made upon information and belief, it must be so stated in the body of the pleading, and such denials are to be construed for all purposes, including a criminal prosecution, to mean that it was made upon information and belief of the person verifying such pleading.¹⁵ The above are referred to here not as being decisions made upon partition cases, but as coming within the general rules governing the pleadings of the defendant.

The answer may put at issue the same question between two or more defendants. In such a case, all of the defendants that will be affected by the determination or final judgment have their rights, and can come into court and protect those rights.^b This often happens in partition cases.

346; 21 Hun, 436; 24 Id. 347; 74 N. Y. 61; 18 How. 240; 5 T. & C. 449.

¹² *Otis v. Ross*, 8 How. Pr. 193; 11 N. Y. Leg. Obs. 343.

¹³ *Hopkins v. Averett*, 6 How. Pr. 159.

¹⁴ *Gould v. Williams*, 9 How. Pr. 59, 427, 217.

¹⁵ *Throop's note to section 524.*

^b Where the judgment may determine the ultimate rights of two or more defendants, as between themselves, a defendant who requires such a determination must demand it in his answer, and must at least twenty days before the trial serve a copy of his answer upon the attorney for each of the defendants to be affected by the determination, and personally, or as the court or judge may direct, upon defendants, so to be affected who have not duly appeared therein by attorney. The controversy between the defendant shall not delay a judgment, to which the plaintiff is

Section 1543 of the New York Code of Civil Procedure provides, that the titles of the parties may be tried, and when the titles of the parties are before the court, section 521 of the Code, above referred to, must be complied with.^c The title or interest of the plaintiff may be controverted by any defendant, or any defendant may controvert the title or interest of one or more of his co-defendants; and that question must be settled, and the title established before judgment of partition can be rendered. This somewhat changes the practice in vogue before the present New York Code, where the courts held, that the titles of the parties should be first established by proper action before proceedings for partition could be had.¹⁶ Under the Code practice, where a husband conveyed to his wife through a third person the westerly half of a block of land owned by him, on which half were situated the dwelling-house occupied by him as a homestead, and the out-buildings, and the will contained the following clause: "I have heretofore conveyed through a third person to my said wife the house and lot which I now occupy, and it is my wish and desire, which I trust my wife will regard, that she will not sell or

entitled, unless the court otherwise directs. N. Y. Code Civ. Pro. § 521.

^c The title or interest of the plaintiff in the property, as stated in the complaint, may be controverted by the answer. The title or interest of any defendant in the property, as stated in the complaint, may also be controverted by his answer, or the answer of any other defendant; and the title or interest of any defendant, as stated in his answer, may be controverted by the answer of any other defendant. A defendant, thus controverting the title or interest of a co-defendant, must comply with section 521 of this act. The issues, joined as prescribed in this section, must be tried and determined in the action. N. Y. Code Civ. Pro. § 1543.

¹⁶ *Van Schuyver v. Mulford*, 59 N. Y. 426, *ante*.

incumber said house and lot during her life, but will retain and occupy it as a house for herself and such of my children as may need or require one." The court held, that no real estate was devised by this clause of the will, and that the wife did not acquire any title or interest in the westerly half of said block thereof by grant from her husband, or under said will, and that the question of title might now be tried and determined in an action for partition.¹⁷ Where the title is denied in the answer, the burden of proof is on the claimant out of possession.¹⁸ It is a uniform and fundamental rule in chancery suits that evidence sufficient to sustain the decree must be preserved in the record in some mode, otherwise the decree will be reversed.¹⁹ There is a rule of law, which may be of interest here, that a party will not be permitted to question a transaction which in any way affects his interest.²⁰

In an action for partition, it seems that defendants claiming an interest in or lien upon the premises sought to be partitioned, will be obliged to litigate the validity thereof with a co-defendant who, under section 1543 above referred to, controverts their interest or lien, notwithstanding all the allegations in the complaint relating to their interest in the premises have been struck out by order of the court. Where a pleading contains a semblance of a cause of action or defense, its sufficiency cannot be determined upon a motion to strike it out as irrelevant or redundant. The question as to the sufficiency of a pleading in stating a cause of action or defense

¹⁷ *Knapp v. Burton*, 7 Civ. Pro. 448, *ante*.

¹⁸ *Ransom v. Henderson*, 1 Western R. 636. See 67 Ill. 236; 48 Id. 111; 2 Gilm. 279; 78 Ill. 553; 3 Ired. 209; 4 Rand. 74; 15 Am. Dec. 731; 14 Ga. 521; 60 Am. Dec. 655; 14 Ohio, 502.

¹⁹ *Pankey v. Raum*, 51 Ill. 88; 15 Bradw. 331.

²⁰ *Mf'g. & M. Co. v. Cady*, 96 Ill., 430. See 98 Ill. 511.

against a party, or as to his liability upon a given state of facts, can properly be raised only by a demurrer to such pleading. On a motion to strike out the allegations of a complaint referring to the interest of a defendant, as irrelevant or redundant, the question whether he was properly made a party defendant cannot be raised or determined. The power of the court to expunge matter from a pleading, upon motion, for irrelevancy, refers to such matter as is irrelevant to the cause of action or defense attempted to be stated in the pleading against the party moving to expunge, and does not enable a party to strike out allegations relating to himself because they are irrelevant to an alleged cause of action against some other party.²¹ An allegation that the defendant's wife has an inchoate right of dower and is a necessary party to the action does not state any defense.²²

An answer in a partition suit which alleges that the defendant, one of the tenants in common, owns the lot adjoining one of the lots sought to be partitioned ; that their father, from whom the estate comes, in his life caused to be erected a two story and basement building with stone foundation, partly on defendant's own lot and one of the lots involved in such suit, without authority, so far as defendant's lot was concerned, and asked to be awarded full possession of his lot, and for five hundred dollars damages, is a nullity, and the usual order of reference as upon default is proper.²³ Where, in a partition suit, one of the parties in interest has in his possession a portion of the estate, and has been in the habit of collect-

²¹ *Hagerty v. Andrews*, 4 Civ. Pro. R. 323 ; also 94 N. Y. 195 ; see 4 *Paige*, 441 ; 55 N. Y. 442.

²² *Kay v. Whitaker*, 44 N. Y. 565.

²³ *Nolan v. Skelly*, 62 How. Pr. 102.

ing the rents, as he alleges, for the protection of the income from waste, and a receiver of such property should not be appointed upon affidavit upon information and belief, that such party is of little or of no responsibility.²⁴ In an action for the partition of lands, on which there has been a stone-quarry, a tenant in common, who is made a defendant, may set up in his answer that the defendant has been in the sole possession of the premises, has collected the rents thereof, quarried and sold stone therefrom, and may require an account to be rendered of the moneys so received by the plaintiff, and have an allowance made to himself therefor.²⁵ A co-tenant, out of the actual occupation, asking the aid of a court of equity for partition against a co-tenant, who has made improvements upon the property, is entitled to relief only upon condition that no equities thereby arising shall be taken into account. And in such cases, the defendants are entitled to an allowance for the enhanced value of the property resulting from the repairs and improvements made by them.²⁶ When all the questions that arise in the action are submitted to the court, without an answer or objection, no appeal will lie, and if the questions are submitted without objection, those objections cannot be raised upon appeal.²⁷

To maintain an action for partition of lands, the plaintiff must, at its commencement, have actual or con-

²⁴ *Darcin v. Wells*, 61 How. Pr. 259.

²⁵ *McCabe v. McCabe*, 18 Hun, 153. See 18 Barb. 665; 48 N. Y. 108; 40 Barb. 300; 15 Hun, 309; 44 Barb. 447; L. R. 20 Eq. 84; 1 Parsons Pa. R. 470; 22 Grant Can. 562.

²⁶ *Ford v. Knapp*. 102 N. Y. 135. See 72 N. Y. 575; 9 Bush, 313; 68 Me. 568; 6 Dana, 281; 27 Gratt. 414; 33 N. J. Eq. 421; 79 Ill. 446; 18 Mo. 471; 11 Heisk. 669; *Cooley on Tax.* 346; 3 Paige, 545.

²⁷ *Barnard v. Onderdonk*, 98 N. Y. 158.

structive possession in common with the defendants ; and the possession of one of the co-tenants in common may become adverse, when his acts amount to an exclusion of his co-tenants ; and this may be set up as a defense.²⁸ Where the plaintiffs in a bill in equity for partition were formerly in possession of the premises as tenants in common, and the defendant set up in his answer an exclusive title, the bill will be dismissed.²⁹ The defendant may set up in his answer an equitable title to the premises, a cross bill not being necessary for that purpose, when he seeks merely a dismissal of the bill.³⁰ If the plaintiff aver that he and the defendant are owners of certain land and in possession of the same as tenants in common, an answer which denies that they are owners, and in possession as tenants in common or otherwise, is not a sufficient denial of the common occupancy of the land by them.³¹ Where the defendant does not aver any of the allegations of the complaint, but merely sets up a partnership between the owners, the answer is bad.³² A judgment of partition ought not to be rendered when it will permit the plaintiff, or compel the defendants to commit a breach of trust.³³ The mere putting in of an answer claiming title to the whole premises does not prevent the court from ascertaining whether any such title existed, or from determining whether there was a subsisting adverse possession.³⁴

²⁸ *Florence v. Hopkins*, 46 N.Y. 182.

²⁹ *Matthewson v. Johnson*, 1 Hoffman Ch. 559. *Contra*, 5 *Jones*, 22.

³⁰ *German v. Machin*, 6 Paige, 288.

³¹ *Crosier v. McLaughlin*, 1 Nevada, 348.

³² *Hughes v. Devlin*, 23 Cal. 509.

³³ *Baldwin v. Humphrey*, 44 N. Y. 609.

³⁴ *Wainman v. Hampton*, 20 N. Y. Week. Dig. 68. See 4 Civ. Pro. R. 323.

An answer which does not confess or avoid the cause of action, but which affirms facts which are utterly inconsistent with the truth of facts constituting a material element of the cause of action, is but an argumentative denial *pro tanto* of the complaint, and leaves the burden of the issue upon the plaintiff with the right to open and close the case upon the trial.³⁵ An averment that the pleader cannot admit or deny the allegations but demands proof of the same, is no traverse of the facts alleged.³⁶

In Vermont, an objection to the capacity of a party to sue,—for instance that he is insane,—must be made by pleading, and not by answer.³⁷

In partition, if the defendants do not appear, the court will, on motion, make an order for partition as prayed.³⁸ A referee, appointed in partition to take proof, is bound by the pleadings, and cannot find the interest of the parties to be otherwise than as stated and admitted in said pleadings.³⁹

The following general rules in regard to an answer are of interest here, in case relief is sought by the bill. The answer contains both the defendant's defense to the case made by the bill, and the examination of the defendant, on oath, as to the facts charged in the bill, of which his discovery is sought.⁴⁰ These parts were kept distinct

³⁵ *Shulse v. McWilliams*, 1 West. R. 492. See 93 Ind. 198; 101 Ind. 573; 1 Work Pr. 369.

³⁶ *Home Building & Loan Assoc. v. Clark*, 1 West. R. 337.

³⁷ *Hoyt v. Hoyt*, 1 New Eng. R. 638. *Contra*, 54 Vt. 45; 2 Vt. 339; 34 Vt. 256; 7 Wallace, 542; 90 U. S. bk. 23 L. Ed. 70; 54 Vt. 208.

³⁸ *Beekman v. Beekman*, 1 Caines, 121.

³⁹ *McAlear v. Delaney*, 19 N. Y. Week. Dig. 252.

⁴⁰ *Gresley Ev.* 19.

from each other in the civil law; their union in chancery has caused much confusion in equity pleadings.⁴¹ The answer is in form usually as follows: First, the title specifying which of the defendants it is the answer of, and the names of the plaintiffs in the cause of which it is filed as answer.⁴² Second, a reservation to the defendant of all the advantages which might be taken by exception to the bill, which is mainly effectual in regard to other suits.⁴³ Third, the substance of the defense, according to the defendant's knowledge, remembrance, information, or belief, in which the matters set up in the bill with the interrogatories founded thereon, are answered, one after the other, together with such additional matter as the defendant thinks necessary to bring in his defense, either for the purpose of qualifying or adding to the case made by the bill, or to state a new case in his own behalf. A general traverse or denial of all unlawful combinations charged in the bill, and of all matters therein contained. The above may be considered the old common-law rule, much of which it is well to follow at this time. The answer must be full and perfect to all of the material allegations, confessing and avoiding, denying or traversing, all of the material parts.⁴⁴ It must state facts, and not arguments.⁴⁵ It may be amended.⁴⁶

⁴¹ Story Eq. Pl. § 850.

⁴² 42 Ves. 79; 1 Russ. 441; 17 Ala. N. S. 89.

⁴³ 1 Hempst. 715; 4 Md. 107.

⁴⁴ 28 N. H. 440; 10 Ga. 442; 3 Halst. Ch. 17; 13 Ill. 319; 21 Vt. 326.

⁴⁵ 7 Ind. 661; 24 Vt. 70; 9 Mo. 605; 18 Ark. 215; 17 Eng. L. & Eq. 509; 22 Ala. 221.

⁴⁶ 2 Brown Ch. 143; 2 Ves. 85; 36 Me. 124; 7 Ga. 99.

CHAPTER XIII.

TRIAL OF ISSUES.

THE Constitution preserves the right of trial by jury in suits at common law,¹ and in all cases in which it has heretofore been used, and shall remain inviolate forever; but the parties have a right to waive a jury at any time they deem proper to do so.² The jury intended is a common-law jury of twelve men.³ The right to jury trial extends only to cases in which it had been exercised before the adoption of the original Constitution.⁴ In partition cases, in New York State, where there is an issue, the parties are entitled to a trial by jury, by the express provision of the Code.⁵ Upon the trial by a jury of issues settled in an equity action, the court has no authority to non-suit the plaintiff. The jury must find upon the issues, and their findings must be presented to the court upon the final hearing. If proof is necessary to establish facts not admitted in the pleadings or found by the jury, such proof

¹ Const. U. S. art. VII.

² N. Y. Const. art. I. § 2.

³ *Wynehamer v. People*, 13 N. Y. 378. See 20 Barb. 567.

⁴ *Duffy v. People*, 6 Hill, 75. See 4 N. Y. Leg. Obs. 307.

⁵ An issue of fact joined in the action is triable by a jury. Unless the court directs the issues to be stated, as prescribed in section 970 of this act, the issues may be tried upon the pleadings. N. Y. Code Civ. Pro. § 1544.

must then be given. The court, using the findings of the jury for its information, finds the facts and decides the law substantially as if all the issues had been regularly tried before it, and exceptions may be taken in the same manner as if the case had been so tried, and findings not thus excepted to cannot be questioned upon appeal to this court.⁵ The court, upon the hearing of the application for a trial by jury, must cause the issues before the trial to be distinctly and plainly stated. The subsequent proceedings are the same as where questions, arising upon the issues, are stated for trial by a jury, in a case where neither party can, as of right, require such a trial; except that the finding of the jury, upon each question so stated, is conclusive, unless the verdict be set aside, and a new trial granted.^b

After the joining of issue, the court may, by consent of the parties, order a reference to determine any issue or question of fact, instead of directing the same to be tried by a jury. When in such cases the referee is directed to report his proofs with his findings, his report has the same

⁵ *Birdsall v. Patterson*, 51 N. Y. 44. See 12 Barb. 385; *Van Santvoord Eq. Pr.* 261, 500.

^b Where a party is entitled, by the Constitution, or by the express provision of law, to a trial, by a jury, of one or more issues of fact, in an action specified in section 968 of this act, he may apply, upon notice, to the court for an order, directing all the questions, arising upon those issues, to be distinctly and plainly stated for trial accordingly. Upon the hearing of the application, the court must cause the issues, to the trial of which, by a jury, the party is entitled, to be distinctly and plainly stated. The subsequent proceedings are the same, as where questions, arising upon the issues, are stated for trial by a jury, in a case where neither party can, as of right, require such a trial: except that the finding of the jury, upon each question so stated is conclusive in the action, unless the verdict is set aside, or a new trial is granted. N. Y. Code Civ. Pro. § 970.

effect as the verdict of a jury would have, and the judge is at liberty to form his own conclusions of fact and of law upon the evidence, using the report merely as advisory.⁶ It is held, that the court may order the issue or any question of fact to be tried by a jury. This corresponds with the old feigned issue in chancery ; the verdict of the jury is to assist the court. In cases of a verdict by a jury, a motion for a new trial is addressed to the discretion of the court. It may grant the motion for reasons which would not avail in a court of law, and it may deny, although there were errors in point of law, at the circuit, or it may decree in accordance with the verdict, or it may disregard the verdict and decree against it.⁷

In New York, it is settled that there cannot be an appeal from the decisions of the Court of Chancery, upon a question addressed to its discretion.⁸ Where, under an order of reference in a partition suit "to inquire and report," the referee reports correct findings of fact and erroneous conclusions of law thereon, upon the coming in of the report the Special Term is not required to send it back for corrections, but may, without exceptions, or independent of them, draw the proper legal conclusions from the facts.⁹ It has been held in the same spirit that where facts are so clearly stated as necessarily to involve a particular consequence, it is for the court to act upon the facts so reported. If all the circumstances appear on the face of the report, a question decided by a master may be

⁶ *Thurber v. Chambers*, 4 Hun, 721.

⁷ *Lansing v. Russell*, 2 N. Y. 563.

⁸ *Fort v. Bard*, 1 N. Y. 43, 125, 426, 533. See 2 N. Y. 186; 55 Id. 41; 56 Id. 192; 66 N. Y. 42.

⁹ *Austin v. Ahearne*, 61 N. Y. 6. See 2 Daniell Ch. Pr. 1314; 6 Ves. 226; 9 Cal. 353.

opened on further directions without any exceptions having been taken.¹⁰ It is true that the courts have made it a general rule that the decision of a referee was final, and could only be reviewed on appeal at the appellate court.¹¹

Where a party commences an action for a partition, and files a notice of *lis pendens*, but fails to proceed in the action with reasonable dispatch, a party named as a defendant, but who has not been served with summons, may apply by petition to have the plaintiff's proceedings vacated.¹²

Where it does not appear from the face of the complaint that another action is pending for the same cause, the objection should be stated as a defense in the answer, otherwise by demurrer; that is, where it appears by the complaint that there is another action pending between the same parties for the same cause, the remedy is by demurrer. But when it does not appear upon the face of the complaint, the objection should be taken by answer. This rule is applicable to a suit brought by a defendant for partition, when there has already been an action brought by one of the parties to the subsequent action and is pending between the same parties for the same cause.¹³

All mere irregularities in the proceedings may be amended *nunc pro tunc*.¹⁴ For instance, if, in bringing a

¹⁰ *Bick v. Motly*, 2 M. K. 312; 2 Ch. Pr. 402.

¹¹ *Dana v. Howe*, 13 N. Y. 306; *Watson v. Scriven*, 7 How. 9, 11; *Conolly v. Conolly*, 16 How. 224; *Cheesborough v. Agate*, 26 Barb. 603; 3 Wait Pr. 321; *Danbery v. Coghlan*, 12 Sim. 507; 2 Dan. Ch. Pr. 1319; 1 Barb. Ch. Pr. 560.

¹² *Lyle v. Smith*, 13 How. Pr. 104, *ante*.

¹³ *Hornfager v. Hornfager*, 6 How. Pr. 279.

¹⁴ *Bogert v. Bogert*, 45 Barb. 121.

ward into court, or in the proceedings before the court, there has been any irregularity, that may be cured by subsequent amendment under the order of the court having proper jurisdiction of the party and of the subject-matter.¹⁵ On a sale in partition, the purchaser, not a tenant in common at the commencement of the proceedings, cannot object to the validity of the sale on the ground that he was not made a party to the proceedings, he holding the deed of a portion of the premises purchased *pendente lite* from some of the heirs, defendants in the partition suit ; especially where the deed expressed in terms that the deed was made subject to the action in partition. Any error in stating, in such proceedings, the precise interest of the parties, or the shares to which they were entitled, is quite immaterial, because the persons interested, where they are all parties to the proceedings, are concluded by the judgment.¹⁶ The General Term of the Supreme Court have the power, on appeal, in an action for partition, to order the amendment of the petition of a committee or guardian of a non-resident infant lunatic defendant, sworn to in another State, and presented here for the purpose of the appointment of a guardian *ad litem* in the action, to the effect that such infant lunatic ward was at the time of verifying his original petition, residing with the committee, the petitioner, or under his charge or custody. Also, in ordering the amendment of the jurat or certificate of the judge attached thereto, stating the place where such petition was verified, and the affidavit taken ; and also an amendment of the certificate of the clerk, so that shall, it in addition to its present contents, certify to the existence of

¹⁵ Rogers *v.* McLean, 34 N. Y. 536.

¹⁶ Noble *v.* Cromwell, 27 How. 289 ; affirming 6 Abb. Pr. 59.

the court, and the genuineness of the signature of the judge, which amendments, when made, shall be deemed to be made and filed *nunc pro tunc*. This is a more full statement of the decision in the case of *Rogers v. McLean*, cited above, and decided by the Court of Appeals, in June, 1886.¹⁷

When the plaintiff has omitted to file any of the papers necessary to the regularity of the judgment, the court may, and in fact should order them to be filed *nunc pro tunc*.¹⁸ The proceedings may be so amended as to add thereto the names and bring therein the parties before the court that are owners, or in such a way interested in the action, that they are necessary parties, upon proof that such persons' names were actually omitted, though parties to the summons.¹⁹ The court, upon its own motion, may correct palpable error in the referee's report as to the extent of the interest of an infant party.²⁰ This can be done without sending the report back to the referee, and, undoubtedly, the court has the same power at Special Term to correct the report of the referee as to the extent of the interest of a lunatic or an idiot. The mere variance in the name of an infant between the complaint and petition for a guardian may be disregarded.²¹ It is not necessary that a referee in his report of title to proceedings in partition annex to his report a search for incumbrances affecting the title. It is sufficient

¹⁷ 31 How. 279; 34 N. Y. 536.

¹⁸ *Waring v. Waring*, 7 Abb. Pr. 473; 6 Id. 350; 17 N. Y. 218; 25 Barb. 336; 26 Id. 475; 16 Abb. 59; 27 How. 289; 3 Abb. Ct. App. Dec. 382.

¹⁹ *Van Wyck v. Hardy*, 11 Abb. 473; 20 How. 222; 39 Id. 392.

²⁰ *Safford v. Safford*, 7 Paige, 259; *Carpenter v. Schermerhorn*, 2 Barb. Ch. 314.

²¹ *Varian v. Stevens*, 2 Duer, 635, *ante*.

if his report states explicitly that he has caused the necessary searches to be made, and certifies what incumbrances there are. Neither is it necessary that the referee should advertise for liens.²²

In actions for the partition of real estate the right of the plaintiff to be an owner should be clear to warrant the court to take the custody of the property out of the possession of those having an apparent valid title. Where the executors and trustees are vested with that right under a will, while the claim of the plaintiff, as an heir-at-law, is doubtful and uncertain, her motion for the injunction and receiver pending her action for partition will be denied. Where application is made in such action to remove the trustees on the ground of incompetence or improvidence, upon affidavit founded in a great part upon information and belief, which are unequivocally denied on behalf of the trustees, there is no propriety in granting the motion on such a state of the testimony, nor in trying such question in the action on conflicting affidavits.²³ In an action, brought for the partition of certain real estate, a judgment was entered directing that it be sold, under which it was accordingly advertised for sale. Subsequently the plaintiff applied to the court for leave to discontinue the action, alleging that he was induced to bring the action by the representations of his father, one of the defendants herein, who was tenant for life of the property, to the effect that it was desirable to put it in a situation in which it could be sold, but that no sale was to be made for the present; that the sale now would be prejudicial to the interests of those entitled in remainder,

²² 27 How. 289; 26 Barb. 475; 6 Abb. 59.

²³ Patterson *v.* McCunn, 46 How. 182.

of whom he was one. The court would not allow the action to be discontinued.²⁴ A new trial will be granted on very slight grounds.²⁵

Persons interested in the property, and not made parties to the action, are not estopped by the judgment, even though such judgment may be rendered after a full and fair trial of the issues. All persons interested in the land should be made defendants, and they and no others are estopped by the decree.²⁶ This reference is to a Texan decision, and is such a careful review of the law of estoppel in partition cases, that it is well worth the examination of the student.

The object and purpose of a partition action is merely a separation of the share, or part of one party, from the share, or part of another, either by a division of the land, or else by a division of the proceeds from the sale of the land ; and it does not create title or estate in any one of the parties to the action, and the decree cannot create a title or estate different or other than the common-law title, had by the co-tenants previous to the trial. A judgment in partition, in a proper sense, leaves the title just as it was.²⁷ A trust results, if at all, from the original transaction, at the time it takes place and at no other time ; and it is founded on the actual payment of money and on no other ground. A resulting trust, not within the Statute of Frauds and which may be shown by parol, is when the purchase is made with the proper moneys of

²⁴ *Furman v. Furman*, 12 Hun, 441.

²⁵ *Clayton v. Yarington*, 33 Barb. 144.

²⁶ 1 S. W. 188.

²⁷ *Goundie v. Northampton Water Co.*, 7 Barr, 238 ; *Allen v. Hall*, 50 Me. 263 ; *Kane v. Parker*, 4 Wis. 123 ; 10 Id. 320 ; 11 *Cush.* 168.

the *cestui que trust* and the deed is not taken in his name ; the trust must have been coeval with the writing or deed, or it cannot exist at all. After a party has made a purchase with his own moneys or credit, the subsequent reimbursement cannot, by any retrospective effect, produce a resulting trust.²⁸ Where parties are in possession of land, the law adjudges the possession to be in him who has the legal title or best right.²⁹

Parol evidence to establish a resulting trust should be clear and satisfactory, direct, positive, express and unambiguous.³⁰ Equity will not consider the purchase to be made for the equal benefit of the parties, unless the parties not named in the conveyance can show, by such evidence as heretofore stated, that he was a party to the original purchase at the time it was made, and actually paid a full share of the purchase money before the deed was executed and delivered.³¹ An allegation of a resulting trust must fail, unless a full share of the consideration is proved to have been paid.³² The action must not be destitute of equity.³³ It is not competent for a tenant in common to enforce partition as to a part of the common

²⁸ Edwards *v.* Edwards, 3 Wright, 369 ; Bayly *v.* Boulcott, 4 Russ. 445. See 2 Johns. Ch., 405 ; 2 Cox, 92 ; 1 Lead. Cas. Eq. 202 ; 1 Out. 471.

²⁹ Burns *v.* Swift, 2 Serg. & R. 439.

³⁰ Lloyd *v.* Carter, 5 Harris, 216 ; Poorman *v.* Kilgore, 1 Wright, 309. See 10 Casey, 525 ; 4 Out. 118, 336.

³¹ Jackman *v.* Ringland, 4 Watts & S. 149 ; Kisler *v.* Kisler, 2 Watts, 323 ; Barnard *v.* Jewett, 97 Mass. 87 ; Edwards *v.* Edwards, 39 Pa. St., 369. See 56 Id. 119.

³² McGowan *v.* McGowan, 14 Gray, 119. See 15 Wend. 647 ; 2 Paige, 217 ; Reynolds *v.* Morris, 17 Ohio St. 510 ; Perry *v.* McHenry, 14 Ill. 227.

³³ Baker *v.* Vining, 30 Me. 127 ; Dudley *v.* Bachelder, 53 Me. 408.

estate. He must go for a partition of the estate if he would divide any part.³⁴ Questions of title may be tried by a court, as has been remarked in a previous chapter in this work; but that rule is not common to all States. Evidence adduced of circumstances under which a sole grantee in a deed was reimbursed by his brother for half the purchase money, held, sufficient to show that the transaction created a resulting trust valid against the grantee, and was not a parol sale of a half interest.³⁵

A tenant in fee simple of land, subject to a life estate in an undivided half, may maintain a petition for partition under the statute against a tenant for life. There is no way in which the value of the widow's share can first be set off to her, under this petition, without making her a party. It is in the discretion of the court, on her application, to allow her to obtain a partition, and for the court to determine whether a case is shown for the sale of the land. The petitioner is entitled to maintain the petition against the widow, as well as against the other respondents, for a half share in which he has an estate in possession, and the court has authority under the statute to order the sale of the land.³⁶ A life estate is not in the nature of an estate in dower unassigned, which, while not a bar to partition among reversioners is not subject to partition with them.³⁷ Partition may be had by or against a tenant for life.³⁸ Proceedings brought by a widow to

³⁴ Washb. Real Prop. 447, § 6; *Duncan v. Sylvester*, 16 Me. 388; 11 Pick. 311; 52 Me. 25; 36 Cal. 116; 12 Me. 145; 13 Pick. 227; 1 Miles, 168; *Freem. Cot.* § 508.

³⁵ *Ackley v. Ackley*, 1 Cent. R. 405.

³⁶ *Allen v. Libbey*, 1 New Eng. R. 73.

³⁷ *Motley v. Blake*, 12 Mass. 280; *Ward v. Gardner*, 112 Mass. 42.

³⁸ *Mussey v. Sanborn*, 15 Mass. 155. See 9 *Allen*, 260; 109 Mass. 181.

have her interest set off in the manner in which dower is set off, does not prevent her petitioning to have her life interest set off to her by proceedings in partition ; her title is as absolute as if under a devise for life in all lands of the estate.³⁹ The rule that one tenant cannot have partition as to part of the common property, does not apply where there is an outstanding life estate in one parcel, as in case of dower.⁴⁰

Between tenants in common partition is, in equity, a matter of right and not of discretion, whenever either of them will not hold or use the property in common. And courts of equity have concurrent jurisdiction with courts of law in such actions. To entitle a complainant to partition he must show a clear title in himself, and in some cases the bill will be retained to give him time to establish it in law when it is disputed. When the court in a process in equity has acquired jurisdiction for the purpose of construing a will, it may, if there is no defect in the plaintiff's title, do complete justice between the parties by compelling an account and partition when that is asked for in the bill.⁴¹ A tenant in common defendant can make no objection to the partition prayed for, it being a matter of absolute right of every tenant in common to enjoy his share in severalty.⁴² It is generally a fundamental principle underlying all proceedings for partition in equity, that the court will not look beyond the legal title. If that is before it, it will proceed, unless there is some controversy between the parties in relation to it, when they will be turned over to the court of law to settle such

³⁹ *Sears v. Sears*, 121 Mass. 267.

⁴⁰ *Taylor v. Blake*, 109 Mass. 514. See 9 *Allen*, 260.

⁴¹ *Nash v. Simpson*, 1 New Eng. R. 699, *ante*.

⁴² *Hanson v. Willard*, 12 Me. 146.

questions.⁴³ The power of a court of equity to grant partition is not discretionary.⁴⁴ It is a matter of right between the co-tenants of the property.⁴⁵ Where one tenant has received more than his share of the rents and profits, an accounting may be decreed and directed upon the trial of the issues, and reimbursements had.⁴⁶ Where the defendant is in possession claiming to hold under a will, and the plaintiff files his bill under the statute to have the will construed for accounting and partition, the court, in the absence of any defect in the latter's title, having acquired jurisdiction for the purpose of construing the will, have authority to do complete justice between the parties by compelling an account and partition.⁴⁷ The defendant can raise the question as a defense, that he has the legal title to the premises.⁴⁸ When a court of equity obtains jurisdiction of the subject-matter for any purpose, it will retain it for all purposes of affording adequate and full relief between the parties; hence, where the bill of the complainant sets out facts necessary to obtain the order of the court for the partition of the property, and all the parties interested in the matter and who can be affected by the partition appear, and they are the same parties who are solely interested in the proceedings and relief asked upon the other branch of the case, the court may

⁴³ *Gray v. Parpart*, 106 U. S. 689.

⁴⁴ *Wisely v. Findlay*, 3 *Rand.* 361; *Burleson v. Burleson*, 28 *Tex.* 383.

⁴⁵ *Agar v. Fairfax*, 17 *Ves.* 533; 12 *Me.* 142; 35 *Id.* 107; 50 *Id.* 253; 62 *Id.* 112.

⁴⁶ *Leach v. Beattie*, 33 *Vt.* 195; 1 *Story Eq.* § 655.

⁴⁷ *Scott v. Guernsey*, 60 *Barb.* 178; *Dameron v. Jameson*, 71 *Mo.* 100.

⁴⁸ *Portis v. Hill*, 14 *Tex.* 69. See 28 *Id.* 383; 106 *U. S.* 679; 100 *Id.* 564; 102 *Id.* 647.

decree a partition of the lands.⁴⁹ It is the more general and beneficial rule of equity jurisprudence that jurisdiction having once been obtained, it shall remain and be effectual for the purpose of complete relief therefor. When a suit is rightful in equity, and it appears that the parties before the court are co-owners and entitled to a partition of the land of which they are co-owners, a decree for partition may be made retrospective of the question, whether the plaintiff is seized or not.⁵⁰ Compulsory partition may be obtained in some States, though a co-tenant be disseized of the land. This rule was first disputed in Massachusetts.⁵¹

The mortgagor in possession, and before the entry of the mortgagee for a broken condition of the mortgage, has a right to compel a partition. But such partition is only binding on his interest, and cannot prejudice or injure the mortgagee.⁵² The existence of a vendor's lien against the plaintiff does not impair his right to bring an action for the partition of the premises.⁵³ It is held in Massachusetts, or rather inferred by the court, that the execution of a mortgage by one seized of a half of the premises, gave the mortgagee a legal seizin and a right of possession, by virtue of which he might maintain suit for the partition of such premises.⁵⁴ The court should consider the equities of all the parties to the proceedings, and upon the trial should pass upon the rights and interests of all

⁴⁹ Wallace *v.* Wallace, 6 Western R. 113.

⁵⁰ Scott *v.* Guernsey, 60 Barb. 178, *ante*. See 5 Id. 62; Freeman on Co-ten. 449.

⁵¹ See 14 Mass. 436; 9 Am. Dec. 225.

⁵² Colton *v.* Smith, 11 Pick. 311; Call *v.* Barker, 12 Me. 327; Wotten *v.* Copeland 7 Johns, Ch. 140.

⁵³ Hall *v.* Morris, 13 Bush, 322.

⁵⁴ Rich *v.* Lord, 18 Pick. 328.

the parties that are before it.⁵⁵ Such equities, as the parties may have, should be adjusted, and may be enforced in a suit for partition, and where such equities arise only out of the relation of the parties in the common property.⁵⁶ And if an equitable cause of action is set up in the bill, for which the court can grant no relief, that of itself is not a sufficient reason for the dismissal of the bill, providing there are other equities before the court that arise by reason of the relation of the parties as co-tenants, or by reason of their relation to the action by having an equitable right in the common property.⁵⁷ Common property cannot be partitioned in fragments ; that is, it is not the practice of the court to cause or decree a partial partition.⁵⁸ Compensation for improvements on the premises may be allowed, when the equities, accruing to a co-tenant, are such as to ordinarily entitle him to such improvements.⁵⁹ It is the practice in Maine, if improvements are made by a co-tenant on a part of the estate, while he was in possession, and such improvements were made by mutual consent, to assign to the co-tenant thus improving the premises his share out of the part possessed and improved by him. And if the improvements are made by him while out of possession, he is entitled to have their value considered in the partition of the premises, and be recompensed for them.⁶⁰ In Indiana, no

⁵⁵ *Packard v. King*, 3 Col. 211. See 25 Ohio, 656.

⁵⁶ *Steward's Heirs v. Colter*, 4 Rand. 74; 15 Am. Dec. 731.

⁵⁷ *Hoffman v. Rice*, 25 Mich. 176; *Pigg v. Carroll*, 89 Ill. 207.

⁵⁸ *Waring v. Wadsworth*, 8 N. C. 345; 62 Me. 112; 54 N. H. 441; 1 Miles, 167; 2 Swan, 199; 3 Edw. Ch. 229.

⁵⁹ *Green v. Putnam*, 1 Barb. 500. See 26 Ind. 105; 3 Edw. Ch. 323; 8 Price, 518; 55 Ill. 521; 11 Tex. 390.

⁶⁰ *Lord v. Lord*, 68 Me. 568.

allowance will be made out of the proceeds from the sale of the common land, unless such improvements have been necessary for the enjoyment of the estate.⁶¹ In Alabama, the claim for improvements, if allowed, must be inserted as a counter demand to a claim for rent.⁶² In New York, the rule seems to be somewhat different. Where, during the existence of the life estate, certain of the devisees of the remainder, with full knowledge of the limited title of the tenant for life, and without the consent of the other remaindermen, erected buildings upon the premises devised, it was decided, that the persons erecting such buildings were not entitled to any compensation therefor, and, upon partition, could not exact a reimbursement, from claim or lien upon, the shares of their co-tenants, but that the rents by one tenant in common against another could be adjusted, upon the trial of the issues, in a partition action.⁶³

The Statute of Limitations does not bar relief between tenants in common of the lands, in an action of partition. But a delay of twelve years until after the death of an ancestor of a party, who could defend against the claim with a fuller knowledge of the facts than his heirs can do, operates against the assertion of the claim. In an action of partition, brought by heirs against another heir, the latter is not a competent witness to prove that the land did not belong to the ancestor, but belonged to himself individually.⁶⁴ Any gift or conveyance of property by a

⁶¹ *Elrod v. Keller*, 89 Ind. 382

⁶² *Ormand v. Martin*, 37 Ala. 606; *Horton v. Sledge*, 29 Ala. 498.

⁶³ *Scott v. Guernsey*, 48 N. Y. 106. *Contra*, *Hoffman*, 21; 1 *Barb.* 500; 2 *Caines*, 302; 1 *Gilm.* 39; 1 *Dana*, 170; 7 *Marsh.* 141.

⁶⁴ *Ill. Rev. Stat. ch. 51, 1874*; *Comer v. Comer*, 6 *West. R.* 72.

parent to a child, or purchase in his name or for his use or benefit, is presumed to be intended as an advancement.⁶⁵ To claim a share in the estate left, the advancement must be brought in for computation within a reasonable time by adults, and minors will be protected in all actions by the court.⁶⁶ In a suit against several defendants for partition, where summons was personally served on one defendant, and by publication of notice on the other defendants, they being non-residents, the court having jurisdiction of the subject-matter and acquiring jurisdiction of the person of the defendant personally served, and deciding, before proceeding with the trial, that it had acquired jurisdiction of the non-resident defendants by the due publication of notice of pendency of the suit, and objection taken sixteen years after judgment therein, partitioning the land among claimants, based upon the fact that the affidavit for publication of notice of pendency of the action was defective and insufficient, and did not authorize publication of such notice, will not prevail to prevent the record of such suit from being admitted in evidence in a subsequent suit for partition of the same lands, brought by the defendants in the former suit.⁶⁷ Void judgments are not admissible, in evidence, upon the trial of issues for any purpose.⁶⁸ Such a judgment should be treated as a nullity, when collaterally attacked.⁶⁹ Under a general issue, a former judgment, if proper, is admissible.

⁶⁵ *Ray v. Loper*, 65 Mo. 472. See 31 Ill. 345; 9 Id. 304; 14 Id. 418.

⁶⁶ *Sims v. Sims*, 2 Ala. 118; *Gratt v. Gratt*, 18 Ill. 107.

⁶⁷ *Carrico v. Tarwater*, 1 West. R. 144.

⁶⁸ *Rhodes v. Delaney*, 50 Ind. 468; *Galpin v. Page*, 18 Wall. 350. See 33 Me. 414; 13 Ill. 432; 26 N. H. 233; 22 Barb. 271; 16 Vt. 246.

⁶⁹ *Seely v. Reid*, 3 Iowa, 374; *Dick v. Hatch*, 10 Iowa, 380; *Withers v. Patterson*, 27 Tex. 491. See 11 Ga. 453; 8 Bush, 284.

sible as evidence upon the trial.⁷⁰ A proper judgment is not subject to be attacked collaterally.⁷¹

For the sake of convenience, in equity a recompense may be made by a sum of money to one of the parties, so as to prevent injustice or unavoidable inequality; or the court may order a sale of the subject-matter and a division among the several owners according to their respective titles, as its powers are adequate to full compensatory adjustment.⁷² The court of equity, upon the trial of issues for the purpose of making partition of a spring and aqueduct owned in common by several persons, have jurisdiction, and a sale of the whole may be ordered by the court, although the right of one of the owners has become appurtenant to his other real estate.⁷³ This is based upon the general rule in equity that between tenants in common partition is a matter of right and not of discretion, whenever any one or more of them will not hold, use and enjoy the property in common. And it is the duty of a court of equity to equitably divide the property and assign to each his just and reasonable portion.⁷⁴ Upon the trial, if it appears by proof before the court that the land cannot be divided without injury to the equitable interests of the co-tenants owning the land, then, it is the duty of the court to direct a sale of the premises and a division of the proceeds, and to pay the

⁷⁰ *1 Greenl. Ev.* § 531; *Gavin v. Graydon*, 41 Ind. 559. See 70 Ind. 6; 97 Ind. 222.

⁷¹ *McAlpine v. Sweetser*, 76 Ind. 78; *Helpenstine v. Bank*, 60 Ind. 582; *Parker v. Wright*, 62 Ind. 398.

⁷² *Pell v. Ball*, 1 Rich. Eq. 361. See 2 *Jones Eq.* 334; *Gregory v. Gregory*, 69 N. C. 522; *Royston v. Royston*, 13 Ga. 425. See 27 Cal. 92; 26 Ga. 515; 8 *Bush*, 334; 32 Md. 571; 3 *Head*, 15.

⁷³ *Allard v. Carleton*, 1 *New Eng. R.* 853.

⁷⁴ *Wood v. Little*, 31 Me. 107; *Allen v. Hall*, 50 Me. 25; 30 *Amb. R.* 236; 17 *Vest.*, 533; *T. A. Thompson's Law Cases*, 516.

costs and expenses of the litigation. Where the real estate of which partition is sought consists of a mill-dam, and the lands overflowed by the mill-pond, constituting the water-power which is necessary for the use of various mills which belong in severalty to the respective tenants in common of such dam and pond, an actual partition of the water-power should be made, instead of a sale thereof, if the whole water-power in connection with the mill property held in severalty by either party, would not be worth more than the same water-power equally divided, by a proper partition thereof, the one half to be used by the mills of each, in the hands of different proprietors.⁷⁵ The rule for partition of alluvion between adjoining owners is : (1) Measure the whole extent of the ancient bank, and compute how many feet each riparian proprietor owned on the river line. (2) Divide the newly-formed bank into parts corresponding to the number of rods or feet which the old line measured, and appropriate to each proprietor as many portions of the new river line as he owned rods or feet which the old line measured, and appropriate to such proprietor as many portions of the new river line as he owned rods and feet on the old. Then, to complete the division, lines are to be drawn from the points at which the proprietors respectively bounded on the old to the points thus determined on as the points of division on the new shore. This rule may require modification, according to the circumstances and location of the alluvion owned in common, but is a general rule guiding the

⁷⁵ *Smith v. Smith*, 10 Paige, 470; citing 1 Ves. & Beames, 554; 3 Fairf. 146; Allnatt on Part. 4, 78, 87; 8 Ves. 143; 13 Pick. 236; 1 Aiken, 67; 5 N. H. 134; 14 Wend. 204; 2 Blunt Amb. 589; 1 Peer Wms. 446; 3 Younge & Coll. 540.

court upon a trial and in making its decree.⁷⁶ Where lots are conveyed with express reference to a recorded plat, evidence to control, or in any way affect the plat, is admissible. Land gained from the sea by alluvion or dereliction, if the same be by little and little, by small and imperceptible degrees, belongs to the owner of the land adjoining. In an apportioning to proprietors their respective shares of alluvial accretion, the whole length along the shore of the alluvion should be first found, and then it should be divided among the proprietors of the upland in proportion to their share line."⁷⁷

The rule that in equitable actions the court is not restricted to the mere remedy demanded, but will adjust all the rights of the parties,—applied, where an action was brought for partition of a testatrix's realty among her heirs at law, and a creditor, who had obtained a judgment against her executor for services rendered testatrix, was made a party, and, setting up these facts in his answer, demanded that his debt be paid out of the sales of the premises before distribution of the proceeds, and there was no personal estate to satisfy the debt,—the court holding that while the judgment was no lien upon the premises or their proceeds, the testatrix had by the following clause in her will made the debt a charge upon her real estate: "I will and direct that my just debts and personal expenses shall be paid out of my estate by my said executors, as soon as conveniently may be, after my decease."⁷⁸

It is a question for the court to determine whether a

⁷⁶ *Johnston v. Jones*, 1 Black, 209.

⁷⁷ *Jones v. Johnston*, 18 How. U. S. 150. See *Kennedy v. Hunt*, 7 How. U. S. 586.

⁷⁸ *Hibbard v. Dayton*, 32 Hun. 220; citing 1 Barb. 509; 55 N. Y. 442.

sale shall be ordered before any attempt at actual partition has been made. This is to be determined from all the facts and circumstances of the case. For instance, where the property in question consisted of farming land with only one set of buildings thereon, and the undivided shares of the owners were respectively subject to mortgage,—Held, a proper case in which to decree a sale instead of attempting actual partition.⁷⁹ The death of a plaintiff before the entry of the decree in the partition suit cannot affect the rights of the purchasers as far as the action was concerned.⁸⁰

If the defendant does not appear in the action, and is in default, there are, of course, no issues to be tried by the court. But nevertheless the material facts set forth in the complaint must be proven to the satisfaction of the court, or at least a sufficiency of those material facts must be proven, so that the court may order a partition of the land, or a sale and a division of the proceeds. In case of default, the title to the land must be ascertained by the court, or, where one of the parties is an infant, the court must ascertain the rights, shares and interests of the several parties in the property, by a reference, or by having the proof taken directly in court, before a judge thereof, in special term, before an interlocutory judgment can be rendered in the action. ^d

When the suit is commenced by summons and notice, and the defendants do not answer within the time pre-

⁷⁹ *Odell v. Odell*, 19 *Week. Dig.* 13.

⁸⁰ *Jordon v. Van Epps*, 85 *N. Y.* 457.

^d Where a defendant has made default in appearing or pleading, or where a party is an infant, the court must ascertain the rights, shares and interests of the several parties in the property, by a reference or otherwise, before interlocutory judgment is rendered in the action. *N. Y. Code Civ. Pro.* § 1545.

scribed by the Code, it is unnecessary to enter an order for their default in not so answering, because the plaintiff is entitled to the relief asked for in and according to his notice, upon failure to answer.⁸¹ The entry of an order for default in such a case undoubtedly is harmless, it being an unnecessary proceeding. The summons requires the defendant to answer within a certain number of days. The notice gives him knowledge of the nature of the action, and the demand that will be made upon the court for judgment, inasmuch as he has been required to appear and has been notified what judgment will be taken against him, providing he does not appear. If the court require an order of default to be entered, it would make the summons and notice meaningless papers within the eye of the law. Where the defendant omits to answer, the plaintiff must exhibit proof of his title as required by the Revised Statutes.⁸² The proof of title may be made before a master, or before a referee.⁸³ The notice in partition cases may be similar to the notice served with the summons in a foreclosure case, in this respect: it may contain a statement to the effect that certain defendants named in such statement, are in no wise interested in the proceedings, in such a manner that a personal claim or demand can be made against them, and that no "personal claim is made against them."

This rule is recognized in the case of *Varian v. Stevens*, heretofore cited, and in many other cases in the books. If the summons and notice should be served upon such a defendant, and no notice that no personal claim would be made against him, he would have a right to appear in

⁸¹ *Watson v. Brigham*, 3 How. 290.

⁸² *Ripple v. Gilborn*, 8 How. 456.

⁸³ *Larkin v. Mann*, 2 Paige, 27.

court, for the express purpose of protecting himself against any personal claim that might be made, and it would be the duty of the court, upon the trial, to protect such a defendant in his demands ; and, if the proceedings were such that it was necessary for him to appear and answer, or even to appear for the express purpose of protecting himself against any injustice or improper demand, the court would award to him his costs for such an appearance. The statute, in substance, is, that if the default of any of the defendants, whether known or unknown, shall have been entered, the court shall require of the petitioners to exhibit proof of their title, and an abstract of the conveyances by which the same is held. Such proof may be taken in open court, or by the clerk thereof, on a reference for that purpose.⁸⁴ It is within the province of a court of equity to exercise its power, within its jurisdiction, to prevent a failure of justice, and a loss of the rights of any of the parties.⁸⁵ In reporting upon a title, and the rights and interests of the several parties to a partition suit, the master should require the complainant to produce abstracts of title, as a tenant in common in the premises, and to trace it back to the common source of title of the several tenants in common ; and the master in his report should, as far as is practicable, give an abstract of the conveyances of the several undivided shares or interest of the parties in the premises from the time the several shares were united in one common source.⁸⁶ A purchaser under a partition sale by the heirs at law is

⁸⁴ 2 Abb. Pr. 16, and following pages. See rule 70, N. Y. Sp. Ct. Rules.

⁸⁵ *Gash v. Ledbetter*, 6 Ired. 185; *Wilkinson v. Steward*, 74 Ala. 198.

⁸⁶ *Hamilton v. Morris*, 7 Paige, 39.

not bound to take an affidavit of the administrator or any other person, that there are no debts of the deceased : he is entitled to have the fact made out beyond all reasonable doubt that there are no debts or liabilities of any kind of the deceased, for which there is any risk that the property may be sold, whether those debts are his own, or as surety or contingent. Judgments and decrees do not cease to be a lien as against heirs at law at the end of ten years ; the parties to such an action who choose to omit the ordinary advertisement should produce, at their own cost, regular searches for all judgments and decrees for at least twenty years. The advertisement and reference is intended only as a means for cutting off certain liens. If there are no liens, there is no use of the advertisement ; and if the parties to the suit know there are none, there is no reason why they should be subjected to the expense and delay of an advertisement and reference that must amount to nothing. If there are such liens in fact, the purchaser, on examining his title, will discover them, and decline to take the title until the liens are discharged. ⁸⁷

⁸⁷ *Hall v. Partridge*, 10 How. 188.

CHAPTER XIV.

INTERLOCUTORY JUDGMENT.

INTERLOCUTORY is that decree which is made between the commencement and the end of a suit. Therefore, an interlocutory judgment would be a judgment rendered between the beginning and the ending of an action.¹ Interlocutory judgments are such as are given in the middle of the cause upon some plea, issue, proceeding, or default, and is only intermediate in its nature, and does not finally determine or complete the action. All judgments which leaves something to be done by the court, prior to the determination of the final rights of the parties, and not putting an end to the suit or action in which it is entered, are interlocutory.²

It makes no difference whether the proceedings are prosecuted at law or in equity, or what issues are in the proceedings, or what questions may be raised by the pleadings, or whether there is default upon the part of any or of all the defendants. There are questions that must be settled by the court before the final ending of the suit, because, in all cases of this kind, the rights of the parties are before the court, and the complainant, if in good faith, is praying that such rights may be settled. If

¹ Bouv. Law Dic. 828.

² Blacks. Com. 396. See 4 Price, 134; 2 Bouv. Law Dic. 15.

not in good faith, then it becomes necessary for the court to correct all errors, upon the part of the complainant, whether arising from bad faith or otherwise, and make its decree, which decree becomes part of the records in the action, and a part of the record of the estate sought to be partitioned, affecting for all time to come, whether there is an issue or not. The moieties or shares of the co-tenants must be determined, the rights of all occupants, and when made parties, the position and rights of all who may have liens upon the premises. This is in the form of a decree of the court, and is placed upon record before the division or sale of the premises; thus it becomes a determination in the action, and a record made as such determination after the beginning and before a final ending of the action. Therefore, it is a judgment that is interlocutory.³

It is the province of the court to determine between whom, and in what proportions, and in what manner the division shall be made. If the circumstances are such that a division cannot be made of the premises, without injury to the co-owners thereof, then it becomes the province of the court to direct a sale, and to decree how that sale shall be made, and to direct a division of the proceeds of such sale in accordance with the rights and equities of the co-owners of the property.⁴ In the interlocutory judgment, the court may make such special directions in regard to the division of the land, or in regard to a division of the proceeds, after the sale of the land, as the circumstances of the case may require. It may become necessary, in case one or more of the defendant co-tenants are infants,

³ *Emeric v. Alvardo*, 64 Cal. 529; *Booth Real Actions*, 244.

⁴ *Freem. on Co-ten.* §§ 516, 517; *Dan. Ch. Pr.* 2254; *Ham v. Ham*, 34 Me. 218.

idiots, lunatics, or adjudged habitual drunkards in proper proceedings for that purpose, to make special directions governing and controlling the division of the land, or the division of the proceeds upon the sale of the same between such co-tenants, who are thus mentally or morally disabled. Section 1546^a of the New York Code of Civil Procedure sets forth somewhat fully and concisely the rights and duties of the court in rendering an interlocutory judgment for partition, which law and practice will be found general in some States in the Union.

Where all the parties in a partition suit are adults, and have been personally served with process, the court does not examine the proceedings to ascertain whether all the proper parties are before the court, or whether the master has stated their several rights and interests in the premises correctly, in his report. If the necessary parties are not before the court, in a partition suit, so as to make the decree for partition final and effectual as to all persons interested in the premises, the defendants who were served with process should appear and make that objection. But where persons are proceeded against, in a partition suit, as absentees, or as unknown owners of undivided portions

* The interlocutory judgment must declare what is the right share, or interest of each party in the property, as far as the same has been ascertained, and must determine the rights of the parties therein. Where it is found, by the verdict, report, or decision, or where it appears to the court, upon an application for judgment in favor of the plaintiff, that the property, or any part thereof, is so circumstanced that a partition thereof cannot be made without great prejudice to the owners, the interlocutory judgment, except as otherwise expressly prescribed in this article, must direct that the property, or the part thereof which is so circumstanced, be sold at public auction. Otherwise, an interlocutory judgment in favor of the plaintiff, must direct that partition be made between the parties, according to their respective rights, shares, and interests. N. Y. Code Civ. Pro. § 1546.

of the premises, or where the rights of infants are involved, it is the duty of the court to look into the proceedings and see that the rights and interests of such absentees, or infants, are correctly stated in the master's report; and that all proper persons are made parties, so that the decree will be effectual to bind their rights, as between such persons and the absent or unknown owners, or the infant defendants. Where an undivided portion of the premises, of which partition is sought, has been conveyed to a trustee upon a trust not authorized by the Revised Statutes, the *cestui que trust* is a necessary party to the suit, to make the decree binding upon his interest in the premises. If the absolute title to an undivided portion of the premises is vested in a trustee, upon a valid trust, it seems it is not necessary to make the *cestui que trust* a party to a partition suit in the court of chancery; but that it will be sufficient to bring the trustee, who has the whole legal estate in the premises, before a court.

Where one of the tenants in common of an undivided tract of land pays the taxes upon his share of the tract, and a certain number of acres, undivided, are sold out of the whole tract, to pay the taxes upon the shares of his co-tenants, his legal interest in the whole tract will not be diminished by such sale; but the sale will only diminish the interests of his co-tenants in the undivided tract.⁵ Equity does not act merely in a ministerial character, in case of a partition, and in obedience to the call of the parties who have a right to the partition, but, acting upon its general jurisdiction as a court of equity, it administers its relief *ex aequo et bono*, according to its own notions of equity between parties.⁶ Where a *feme covert* is inter-

⁵ *Braker v. Devereaux*, 8 Paige, 513.

⁶ *Haywood v. Judson*, 4 Barb. 228.

ested in lands sought to be partitioned in the court of equity, she must be made a party to the bill (if within the jurisdiction of the court).⁷ And her rights or interest in the lands sought to be partitioned must be plainly set forth in the interlocutory judgment. In fact, all persons having or claiming an interest in the premises should be made parties, and their rights, claims, or interests should be fixed in the interlocutory judgment.⁸

The interlocutory judgment must set forth the estate of each known owner. If any doubt arises on a bill for a partition, as to the extent of the undivided rights and interests of the parties, the usual course is to direct a reference to a master to inquire and report on them, as the estate and interests of the parties must be ascertained before a commission is awarded to make the partition. But, where the title is suspicious, or litigated, it must be first established at law, before a court of equity will interfere. Where the plaintiff's right to one undivided moiety was admitted by all the defendants claiming the other moiety, but they differed among themselves as to their titles and interests, some of the defendants claiming the whole moiety in fee, and the other claiming and enjoying such portions of it, and asserting a freehold estate therein, the court ordered partition to be made between the plaintiff and all the defendants aggregately ; dividing the premises into two equal moieties, so as to give one moiety to the plaintiff in severalty, and leaving the other moiety to be divided between the defendants, on a further application to the court when their conflicting claims should be established at law ; the plaintiff, in the meantime, to

⁷ *Graydon v. Graydon*, 1 McMullan Eq. 63.

⁸ *Brookfield v. Williams*, 1 Green Ch. 341. See 3 Sand. Ch. 64; 3 Edw. Ch. 323.

pay his own costs of suit, and the expenses of the commission, reserving the question as to the defendant's proportion of costs, until such further application.⁹ There can be no objection to a statement in the interlocutory judgment that certain different portions belong collectively to owners who are unknown.¹⁰ In one case, the court entered an interlocutory judgment stating certain facts and conclusions of law, and ordering a reference as to interest and to take an account of rents received by a defendant, reserving all question of costs until the coming in of the report. The report was made, after which leave was given to file a supplemental answer, and a new reference was had on the coming in of the supplemental report. Trial was had before the court, and a judgment was thereafter entered without any findings of fact or conclusions of law. On motion to vacate this judgment, held, that no other findings were necessary than those first made, as those findings could have been excepted to, on appeal from the judgment, and that would bring them up.¹¹

The order in proceedings for partition, declaring the rights of the parties and appointing commissioners to make partition, is not final, and an appeal from such an order cannot be sustained.¹² A decree which provides for a reference, and reserves further directions until the coming in of the report, so that the cause must be set down again for hearing before all parts of the litigation are disposed of, is not final, and therefore cannot be appealed from, to the court of appeals, although it adjudicates upon

⁹ *Phelps v. Green*, 3 Johns. Ch. 302; citing 17 Ves. 533; 1 Johns. Ch. 111; 1 V. & B. 557.

¹⁰ *Hyatt v. Pugsley*, 23 Barb. 285.

¹¹ *Offinger v. De Wolf*, 43 N. Y. Sup. 144.

¹² *Beebe v. Griffing*, 6 N. Y. 465.

the merits of the cause and disposes of the question of costs.¹³ An order, decree or judgment of the court, which contains a provision for a reference of certain matters, and that all further questions and directions be reserved, is not the final order or judgment contemplated by the Code.¹⁴ A decree which declares the rights of the parties merely, and directs an account in conformity therewith, but reserves the consequential directions and the question of costs until the coming in of the master's report, is not final, but is interlocutory.¹⁵ Neither can the interlocutory judgment at law or the first decree in chancery be created by a direct appeal. They are not final. The parties to the action must wait before appealing until the final judgment shall have been entered.¹⁶

A judgment in an action for partition of lands held by partners as tenants in common, which directs a partition by commissioners and charges a mortgage held by one of the partners covering the undivided interest of his copartner upon the separate share of the latter, is not, where no division has already been made, a bar to an action for the foreclosure of a mortgage.¹⁷ The reason of this is that the action was conducted in subordination of the rights of the mortgagee under the mortgage in suit, which was not a partnership matter, but an individual matter. The action of partition was simply to set apart the interest of each tenant in common, and to make the

¹³ *Cruger v. Douglas*, 2 N. Y. 571. See 4 How. Pr. 78; 9 Paige, 638; 6 How. 203.

¹⁴ 4 How. Pr. 77.

¹⁵ *Johnson v. Everitt*, 9 Paige, 636. See 1 Am. Ch. Dig. 501.

¹⁶ *Cook v. Knickerbocker*, 11 Ind. 230; *Pipkin v. Allen*, 29 Mo. 229; *Medford v. Harrell*, 3 Hawks, 41. See 26 Miss. 501; 6 N. Y. 465; 15 Ind. 10.

¹⁷ *Reid v. Gardner*, 65 N. Y. 578.

mortgage a charge upon the separate interest of the mortgagor, leaving the lien of the mortgage undisturbed thereon. Therefore, the action of partition, or in other words, the former action and judgment, were not upon the same subject-matter.¹⁸

A judgment in an action of partition is binding upon all the parties, and an error of the court in determining whether the case is a proper one for a partition or a sale cannot be questioned collaterally; the judgment is final and conclusive as to all matters incident to or essentially connected with the subject-matter of the litigation, which the parties might have litigated and had determined, either as a matter of claim or of defense.¹⁹ It is binding upon all parties, though minors or non-residents, if the court acquired jurisdiction of them, and of the subject-matter.²⁰ A judgment rendered by a court having power lawfully conferred to deal with the general subject involved in the action, and having jurisdiction of the parties, although against the facts or without facts to sustain it, is not void as rendered without jurisdiction, and cannot be questioned collaterally.²¹ A judgment and sale in partition only concludes contingent interests of persons not in being, when the judgment provides for and protects such interests, by substituting the fund derived from

¹⁸ Tracy *v.* Reed, 4 Blackf. 66; McKinsey *v.* Anderson, 4 Dana, 62; King *v.* Chase, 16 N. H. 9; Spooner *v.* Davis, 7 Pick. 14; Arnold *v.* Arnold, 7 Id. 12; Outran *v.* Morewood, 3 East, 351. See 26 Barb. 423; 25 N. Y. 613.

¹⁹ Jordan *v.* Van Epps, 13 N. Y. Week. Dig. 7. See 56 N. Y. 226; 58 Id. 176.

²⁰ Clemens *v.* Clemens, 37 N. Y. 59; citing 24 How. 183; 36 Barb. 88; 24 Pa. St. 242; 3 N. Y. 511; 5 Id. 184; 34 Barb. 156; 33 N. Y. 87; 35 Id. 653.

²¹ Hunt *v.* Hunt, 72 N. Y. 217.

the sale of the land in place of it, and preserving the fund to the extent necessary to satisfy such interests.²²

Section 1547 of the New York Code of Civil Procedure allows a partial partition. It is true, as has been remarked before in this work, that a partition cannot be had in fragments ; that is, where there are a number of co-tenants whose estate or interest is co-equal, fragmentary partition would not be allowed. It would not be proper for one tenant in common to bring an action for partition for the only purpose of carving out his individual interest in the estate, at the expense of the remainder of his fellow-tenants in common ; but by section 1547, above referred to,²³ provision is made for a division of the property, where the shares and portions of some of the co-tenants is not or cannot be ascertained, and remains unde-

²² *Monarque v. Monarque*, 80 N. Y. 320.

²³ Where the right, share, and interest of a party has been ascertained and determined, and the rights, shares, or interests of the other parties, as between themselves, remain unascertained or undetermined, an interlocutory judgment for a partition, entered as prescribed in the last section, must direct a partition, as between the party whose share has been so determined and the other parties to the action. Where the rights, shares, and interests of two or more parties have been thus ascertained and determined, the interlocutory judgment may also direct the partition among them of a part of the property, proportionate to their aggregate shares. In either case, the court may, from time to time, as the other rights, shares, and interests are ascertained and determined, render an interlocutory judgment, directing the partition, in like manner, of the remainder of the property. Where an interlocutory judgment is rendered, in a case specified in this section, the court may direct the action to be severed, and final judgment to be rendered, with respect to the portion of the property set apart to the parties, whose rights, shares, and interests are determined, leaving the action to proceed as against the other parties, with respect to the remainder of the property ; and, if necessary, the court may direct that one of those parties be substituted as plaintiff. N. Y. Code Civ. Pro. § 1547.

terminated. In such a case, the interlocutory judgment must direct a partition, as between those whose share has been determined and the other parties to the action, leaving intact the share, interest or estate of those that are undetermined. And where the shares and interests of two or more parties have been ascertained and determined, the interlocutory judgment may also direct the partition among them of a part of the property, proportionate to their aggregate shares ; and the court, from time to time, may determine as the other rights, shares and interests, and render another and further interlocutory judgment, directing a partition, in like manner, of the undetermined parts and portions of the same property. And, if the court should deem it proper and for the best interests of those who are concerned in the action, the court may direct that the action may be severed, and final judgment be rendered with respect to that portion of the property set apart to the parties, whose rights, shares and interests, or in other words, whose estates are determined, leaving the action to proceed as against the other parties, with respect to the balance of the property; and, if necessary, the court may direct that one of the parties, whose share, or interest, or estate, is a part of the undetermined remainder, may be substituted as party plaintiff.

Where land, of which one undivided share is held in fee, and the other undivided share in tenancies for life and in remainder, is conveyed in parcels, by successive deeds, to different persons, the latter conveyance expressly referring to the former and being subject thereto, the court, on making partition between the owners of the undivided interest, should give effect to the earliest conveyance in preference to the latter. The principle of parti-

tion is the same, where a sale is necessary, as where actual partition is made ; and the rights of the parties in the proceedings of the sale are the same as in the lands. This is where the equities of the case give some of the parties an interest in specific parcels, they are entitled to have the actual value of such parcels ascertained ; and a judgment directing that the value of parcels assigned on account of such equities shall be estimated at the same rate as the other parcels bring upon a sale, is an error, unless it appears by the record that it did not work injustice.²³

Where the plaintiff's right to one undivided moiety was admitted by all the defendants claiming the other moiety, but they differed among themselves as to their titles and interests, some of the defendants claiming the whole moiety in fee, and the others claiming and enjoying separate portions of it, and asserting a freehold estate therein, the court ordered partition to be made between the plaintiffs and all the defendants, aggregately ; dividing the premises into two equal moieties, so as to give one moiety to the plaintiff in severalty, and leaving the other moiety to be divided between the defendants, on a further application to the court, when their conflicting claims should have been established at law ; the plaintiff, in the meantime, to pay his own costs of suit, and the expenses of the commission, reserving the question as to the defendant's proportions of costs until such further application.²⁴ One tenant may have his share set off to him, while that of the others is sold, if the court is of the opinion that such a course is for the best.²⁵

²³ *Warfield v. Crane*, 4 Abb. Ct. App. Dec. 525.

²⁴ *Phelps v. Green*, 3 Johns. Ch. 302, *ante* ; citing 1 Johns. Ch. 111 ; 1 V. & B. 557 ; 17 Ves. 558.

²⁵ *Haywood v. Judson*, 4 Barb. 228.

If the interlocutory judgment makes provision, where two or more of the co-tenants desire to enjoy their individual shares in common, that a partition can be had, leaving to them in common their shares and portions of the property, and singling or parceling out as to the other co-tenants their respective shares, it is a proper judgment. Section 1548 of the New York Code of Civil Procedure makes provision for this.²⁶ In deciding whether a sale is necessary in a partition suit, the true question for the master is whether the aggregate value of the several parcels into which the whole premises must be divided will, when distributed among the different parties in severalty, be materially less than the value of the same property if owned by one person. Where an estate is actually vested in a devisee who is the natural object of the testor's bounty, the court will not favor a construction of the will which will have the effect of divesting the estate.²⁷

In making partition of real property, the commissioners may assign a portion of the premises, held in common, to one of the parties, charged with a servitude, or easement, for the benefit of another party, to whom a distinct portion of the premises is assigned in severalty.²⁷ Where two or more of the parties interested desire to have their shares set off to them to be enjoyed in com-

²⁶ Where two or more parties, to an action for partition, make it appear to the court, that they desire to enjoy their shares in common with each other the interlocutory judgment may, in the discretion of the court, direct partition to be so made, as to set off to them their shares of the real property partitioned, without partition as between themselves, to be held by them in common. N. Y. Code Civ. Pro. § 1548.

²⁷ *Clason v. Clason*, 6 Paige, 541; affirming 18 Wend. 369; citing 1 Ves. Jun. 366; 11 Ves. 497.

²⁷ *Smith v. Smith*, 10 Paige, 470, *ante*. See 2 Blunt Amb. 589; 1 Peer Wms. 446.

mon, an order of reference will be granted for that purpose. And this should be done before a final decree in partition should be entered.²⁸ Where the interlocutory judgment directs an actual partition of the premises, it must designate three proper and reputable owners of real estate as commissioners, whose duty it is to make the partition as provided for by law.

The section of the New York Code of Civil Procedure making provision for this may be considered as a part of, or the substance of section 25, now 29, of the New York Revised Statutes, which provided that in suits for the partition of lands, tenements or hereditaments, an actual partition or sale, as the case may require, may be adjudged or decreed, wherever and as often as the court may have ascertained and declared so many facts concerning the rights, titles and interests of all or any of the parties to such suit, that a fair and just partition or distribution of proceeds can be made by assigning to any party or parties in severalty, and to any set or sets of parties in common, according to the provisions of section 29 above referred to, and of section 30, the shares in the premises belonging to such parties and sets of parties respectively, or of the proceeds of the sales of the said shares of such parties and sets of parties respectively.

Section 30 is as follows: "When it shall seem proper to the court that a partition or sale should be adjudged or decreed as in the preceding section provided, shares of the premises or proceeds as to which there are conflict-

²⁸ *Northrup v. Anderson*, 8 How. 351. See L. 1847, ch. 557, § 4.

²⁹ Where the interlocutory judgment, in an action for partition, directs a partition, it must designate three reputable and disinterested freeholders as commissioners, to make the partition so directed. N. Y. Code Civ. Pro. § 1549.

ing claims not affecting other shares in such premises or proceeds, may temporarily, and until the determination of such claims, upon further proceedings had between the adverse claimants, be assigned or set off as in common to such adverse claimants, with a proper reservation of the questions of right between such claimants.²⁹

In making partition among several tenants in common of several tracts of land, owned in the same proportions, it is regular to assign to any one or each an entire tract. The prosecution of two writs of partition, at the same time, and for the same object, does vitiate the regular proceedings in one, upon which partition is made. A deputy sheriff summoned for that purpose may legally act as one of the commissioners of partition although he should afterwards make the final return.³⁰ Land purchased with partnership funds, and title taken to parties. One dies: held that the land was held by tenants in common, and the part of the deceased descended to his heirs, and being sold under an order of the court, the purchaser is entitled to partition.³¹

A father who acts as guardian *ad litem* for his children in a suit for partition brought against them is not thereby made a party to the suit so as to be concluded by a judgment in favor of the children, or so as to be estopped to controvert their title.³² A decree in partition is a public record, and notice to purchasers of the particular lots contained in the shares.³³ The judgment cannot be attacked collaterally, or impeached by a petition which

²⁹ See L. 1847, ch. 430, § 2.

³⁰ Smith *v.* Barber, 7 Ham. (Ohio) 118. See Chase's Stat. 1162; Lit. Tenures, 251.

³¹ Green *v.* Graham, 5 Ham. 264.

³² Terrill *v.* Boulware, 24 Miss. 254.

³³ Marshall *v.* McLean, 3 Iowa, 363.

refers to it as evidence.³⁴ A decree of partition of a deceased person's estate made by the probate court is void ; if there is no application to the court ; if guardians are not appointed for minor's interests ; if notice is not given by the committee to the persons interested, and the fact certified in their report ; and if notice is not given of the proceedings in the probate court.³⁵ After an interlocutory judgment in an action of partition, judgment will not be entered upon an award or report of persons amicably chosen by the parties to make partition or appraisement. Parties cannot substitute their own contrivance for the writ of inquisition provided by law.³⁶ In one case the plaintiff in a partition suit was entitled to six-sevenths of the estate, and had the title-deeds. It was held that the proper form of decree, as to the documents of title, was for the delivery to the defendant of such of them as relate exclusively to the land which should be allotted to him, and for the retainer by the plaintiff of the rest, he undertaking to abide by any order which the court might make as to the same, with liberty for either party to apply.³⁷

A sale of the property will not be ordered, where the rights of infants may be prejudiced, if there be any mode whereby the plaintiff may be assigned a portion of the premises, with a charge of owelty.³⁸ Where, upon a petition for partition, in which the petitioner alleged that he was seized as tenant in common with persons unknown, the

³⁴ *Brace v. Reid*, 3 Iowa, 422.

³⁵ *Brown v. Sceggell*, 2 Foster (N. H.) 548.

³⁶ *Bellas v. Dewart*, 17 Pa. St. 85.

³⁷ *Jones v. Robinson*, 27 Eng. L. & Eq. 477 ; also see 28 Eng. L. & Eq. 127.

³⁸ *Walker v. Walker*, 3 Abb. N. C. 12.

court ordered notice to be published in a newspaper three weeks successively, and the petitioner, in proof of compliance with the order, produced two successive papers containing the notice, it was held that the petitioner was not entitled to partition against a co-tenant, who appeared, and objected that notice had not been given to other co-tenants.³⁹ The proceeding in partition under the intestate laws of Pennsylvania, by which the estate is sold by order of the Orphans' Court, creates a lien upon the land for the unpaid purchase money, independent of a mortgage or any other security which may have been taken. And such lien can only be discharged by payment to the heirs.⁴⁰

In North Carolina, a partition between co-heirs under an order of the court is not valid, unless the statute is strictly complied with, and the assent of the heirs cannot cure any informality.⁴¹ A division of an estate by order of the probate court, by which a share was assigned to an heir, before deceased, is not invalid.⁴² The fact that a defendant is in possession of premises, claiming to hold them adversely to the plaintiff, is, in general, a sufficient ground for denying a partition in a court of equity. But when the question arises upon an equitable title, set up by either of the parties, the reason of this rule fails.⁴³ In cases of partition, the court of equity does not act merely in a ministerial character, and in obedience to the call of the parties who have a right to the partition, but, acting upon its general jurisdiction as a court of equity, it administers its relief *ex aequo et*

³⁹ *Ashley v. Brightman*, 21 Pick. 285.

⁴⁰ *Hise v. Geiger*, 7 Watts & Serg. 273.

⁴¹ *Anders v. Anders*, 2 Dev. 529.

⁴² *Wass v. Buckman*, 38 Me. 356.

⁴³ *Hosford v. Mervin*, 5 Barb. Ch. 51.

bono, according to its own notions of equity between the parties.⁴⁴

Rents or profits of premises sought to be partitioned, accruing while the land has been held adversely to the claim of the complainant, even if such rents and profits have been secured by one who is a joint owner of the premises with the complainant, are not recoverable in the court of chancery, upon a bill for partition. They are more properly recoverable as mesne profits, in an ejectment suit brought for the recovery of the possession of the undivided shares of the premises claimed by the plaintiff.⁴⁵ Where two tenants in common of land make a parol partition, followed by long possession, one cannot have partition of the part occupied by the other; but there must be partition of the whole.⁴⁶

A bill in equity by a partner for the partition of real estate of the firm, which does not pray for an account, cannot be maintained by the court until all of the partnership accounts have been taken.⁴⁷ There cannot be a partition of several different tracts of land in one action, unless such several different tracts of land are owned in common by the same persons.⁴⁸ If the title should be an equitable one, or partially equitable and partially legal, the court of equity may try the title; and it may do so when the title is of a legal character, where a fair and perfect trial at law cannot be had.⁴⁹ Land left by

⁴⁴ *Haywood v. Judson*, 4 Barb. 228.

⁴⁵ *Burhans v. Burhans*, 2 Barb. Ch. 398, *ante*.

⁴⁶ *Duncan v. Sylvester*, 16 Me. 388.

⁴⁷ *Baird v. Baird*, 1 Dev. & Batt. 524.

⁴⁸ *Kitchen v. Sheets*, 1 Ind. 138; *Hunnewell v. Taylor*, 3 Gray, 111; *Brownell v. Bradley*, 16 Vt. 105.

⁴⁹ *Hoffman v. Beard*, 22 Mich. 59; *Lambert v. Blumenthal*, 26 Mo. 471; *Obert v. Obert*, 12 N. J. Eq. 423; *Shearer v. Winston*, 33 Miss. 149.

will to two persons in fee, with the condition that it shall be improved by them, is subject to partition ; the division of the fee in no way affects the right to have it improved in common.⁵⁰ And where partition of land includes a mill privilege, the land being owned by two tenants in common, the partition, being by mutual deeds of release, reserved each one-half the mill privilege on said land, with the right of using the same, the land is divided, but the parties yet remain tenants in common of the mill privilege.⁵¹ The interlocutory judgment awarding the partition must set forth plainly the estate and interest of each party concerned.⁵² And it shall direct the manner in which the partition, or, if the land is to be sold, the sale thereof, in which shall be made.⁵³

Oweltly, decreed by the common pleas in partition proceedings in equity and charged on the land allotted, is subject to the lien of a mortgage of the undivided interests for which it is payment ; and the co-tenant to whom the land is allotted must either make application to pay the money into court or else to pay the mortgage debt. A release of the land by the mortgagor, in accordance with the decree, upon payment of the oweltly to him, does not prevent the mortgagee from recovering the mortgage debt from the co-tenant to whom the land was allotted.⁵⁴ A decree awarding the premises to one of the heirs, at the appraisement, divests the title of the other heirs, and of all claiming under them.⁵⁵

⁵⁰ *Richardson v. Merrill*, 21 Me. 47.

⁵¹ *Bailey v. Rust*, 15 Me. 440.

⁵² *Greenway v. Sewell*, 18 Ill. 53.

⁵³ *Young v. Frost*, 1 Md. 377.

⁵⁴ *Reed v. Fidelity Insurance Trust & Safe Deposit Co.*, 4 Central R. 763.

⁵⁵ *Merklein v. Trapnell*, 34 Pa. 42.

CHAPTER XV.

COMMISSIONERS.

WHEN commissioners have been appointed as provided by section 1549, each of these shall, before entering upon the performance or execution of his duties as such commissioner, subscribe and take an oath, in writing, before some proper officer entitled to take oaths and affidavits; which oath must be filed with the clerk of the court, before the commissioners enter upon their duties.* The commissioners must forthwith proceed to make partition, as directed by the interlocutory judgment, unless it should appear to them, or a majority of them, that a partition of the land, or of a particular tract or portion of the land, cannot be had, without great prejudice and injury to the owners; and if the commissioners conclude that a partition of the whole, or of some part, parcel, or lot of the

* Each of the commissioners must, before entering upon the execution of his duties, subscribe and take an oath before an officer specified in section 842 of this act, to the effect that he will faithfully, honestly, and impartially discharge the trust reposed in him. Each commissioner's oath must be filed with the clerk, before he enters upon the execution of his duties. The court may, at any time, remove either of the commissioners. If either of them dies, resigns, neglects or refuses to serve, or is removed, the court may, from time to time, by order, appoint another person in his place. N. Y. Code Civ. Pro. § 1550.

land, cannot be had, without injury or prejudice, then they must report to the court, in writing, that fact.¹

The report of commissioners in partition will not be disturbed, save for cause, which, at law, will allow of a new trial. And such a report will be accorded more respect than a verdict, where the commissioners were selected by the parties in interest, and with particular reference to their qualifications. In general, the report of commissioners will be confirmed, unless they have violated some positive rule of law, or the local interests of the owners, tenants, or other parties interested in the premises.² The report of the commissioners will be regarded with greater consideration even than a verdict of a jury,—that is, when the commissioners are persons selected by the parties themselves on account of their confidence in such parties, and of their superior judgment and capability to perform the particular service for which they are selected.³ The report of commissioners in partition will not be set aside only on grounds similar to those on which a verdict would be set aside and a new trial granted. The affidavits of four credible and disinterested persons for, to three against the setting aside such report, does not carry such weight of evidence as to authorize the court to interfere to disturb the report.³

¹ The commissioners must forthwith proceed to make partition, as directed by the interlocutory judgment, unless it appears to them, or a majority of them, that partition thereof, or of a particular lot, tract, or other portion thereof, cannot be made, without great prejudice to the owners; in which case, they must make a written report of that fact to the court. N. Y. Code Civ. Pro. § 1551.

² *Matter of Pearl Street*, 19 Wend. 651. See 14 Edw. Ch. 597; 32 Cal. 538; 45 Ind. 318; 1 Sheld. 410.

² *Livingstone v. Clarkson*, 4 Edw. Ch. 619.

³ *Doubleday v. Newton*, 9 How. 7; citing 4 Edw. Ch. 596; 19

Notice of commissioners' proceedings in partition is not required by statute to be given to the parties. It would be proper, however, that the parties should have an opportunity to be heard before the commissioners, before making partition. There seems to be a propriety in giving the parties some opportunity of being heard before the commissioners. No technical notice is required, and it has been assumed by one learned judge that the attendance of one of the defendants is sufficient.⁴ The necessity of a notice to those interested must be implied, and for safety it would be much better that those interested should receive such a notice as would convey the intelligence of what the commissioners are about to do, for it is one of those adjudications of a judicial nature affecting the rights and interests of the parties, in which they have a right, in equity, at least, to a substantial and beneficial notice. In *Doubleday v. Newton*, it was held that without a substantial and beneficial notice, the report of the commissioners would be set aside. This notice, perhaps, need not be a technical written notice, but shall be such a one as will give the person notified time to be heard and opportunity to oppose. The commissioners in doing their work are to exercise a discretion, and to decide, after inquiring into all the circumstances of the case; and in every proceeding of such a nature both parties are entitled to be heard, as a matter of right, although the statute may be silent in making provision for such hearing; and the courts, in the protection of the interests of those

Wend. 652; 4 Blacks. Com. 283; Cowen & Hill's Notes, 998; 6 Cow. 103; 23 Wend. 632; 15 Johns. 537; 7 Term R. 364: 8 Vt. 387, 389.

⁴ *Row v. Row*, 4 How. 133; referring to 3 How. 321; 4 How. 83; Code Pro. § 69.

who are concerned in the action, will often deem such a notice as not indispensably requisite.

In the case of the Commissioners of Highways of the Town of Kinderhook *v.* Claw, cited in 9 How. Pr. 74, as authority whether a notice should be given, as the title would indicate, is not an action of partition, but the court seemed to think that the principle involved was such a principle of equity in a judicial proceeding that all parties should be heard, and though not proceedings in partition are proceedings where the equities of those interested are similar to the equities usually arising in partition cases, where the commissioners are appointed; and the decision there was that wherever magistrates proceed judicially, both the parties to the proceedings are entitled to be heard, and a notice to both is indispensably requisite, notwithstanding there is no direction in the act by which the tribunal is constituted, that notice shall be given.⁵

The commissioners must examine the premises; they must divide the property into distinct parcels, and must allot to the respective parties, all things being taken into consideration, their share and portion as parcelled out by the commissioners. The quality and quantity of the land, the improvements upon it, its location, and its general surroundings, should be taken into consideration in making this allotment. It is the duty of the commissioners to do justice. The allotment must be made upon the basis that equity is to be done in the division; that each party is to have as near as possible his share or portion of the property in value. It would be a rare instance where lands could be divided among a number of co-

⁵ 15 Johns. 536; citing 2 Caines, 179. See 3 Johns. 474; 5 Id. 281.

tenants and the lands so situate that each would get an equal quantity, or equal number of acres thereof, each parcel so set off to each co-tenant being of equal value with the other parcels. Thus, it can readily be seen that the parcelling out of the several interests by the commissioners must be based upon the value of the parcels as to the whole property in interest, as the value is the greatest element in the case to be deduced, so that justice may be done to all who are concerned. The commissioners in making the division must designate the several parcels by some permanent mark or monument, so that the division of boundary lines may be known, and the location of each parcel may be easily ascertained. If necessary, the commissioners have power to employ a surveyor, with such assistants as they should need, to aid them in the performance of their duties.⁶ If the persons appointed as commissioners, or any one of them, should die, resign, or neglect to serve, the court may from time to time appoint others in their places, and the court may at any time remove any one, or all of the commissioners.⁶

The statute does not authorize that a portion of the deceased owner's land may be partitioned, leaving the rest to be partitioned on the death of the widow.⁷

⁶ In making the partition, the commissioners must divide the property into distinct parcels, and allot the several parcels thereof to the respective parties, quality and quantity being relatively considered, according to the respective rights and interests of the parties, as fixed by the interlocutory judgment. They must designate the several parcels by posts, stones, or other permanent monuments. They may employ a surveyor, with the necessary assistants, to aid them in so doing. N. Y. Code Civ.

Pro. § 1552.

⁶ 3 Bosw. 439.

⁷ Post *v.* Post, 65 Barb. 192.

Actual partition as between all the plaintiffs on one side, and all the defendants entitled on the other, may be awarded in preference to a sale and allotment of individual shares of the proceeds.⁸ Where a grant is made by the State to riparian owners upon an irregular waterfront, of the land under water to a certain distance from the shore, and an apportionment of the land so granted is afterwards made upon a basis not strictly correct, and one of such proprietors has made improvements, laid out streets and lots and executed conveyances according to such apportionment, during a less period than twenty years, he will be held to have acquiesced in such apportionment so far that he cannot claim a new partition upon technically correct principles. As such acquiescence does not act merely as an estoppel, it is not necessary that the parties seeking to take advantage of it should have been induced, by the conduct of the parties acquiescing, to make improvements according to such apportionment.⁹

The opinion in this case was written by Justice Edmonds, and he lays down the following as the rule for dividing soil formed by alluvion: "The true mode of dividing the land under water thus granted was to assume the water line established by these acts of the legislature as the base; and as it had in it one indentation,—namely, that at the extension of the central line of Harrison-street,—the true base should be ascertained by drawing a line between the two extreme points of the grant, in the general direction there given, and so as to equalize the quantity of granted land on both sides of that

⁸ *Walter v. Walter*, 3 Abb. N. C. 12.

⁹ *O'Donnell v. Kelsey*, 10 N. Y. 412.

line. Adopting this as a base, each riparian owner is to have his proportion of the outer or water line according to the length of his shore line. Thus, as the whole shore line is to the whole water line, so is each one's share of the shore line to each one's share of the water line. . . . The doctrine as to lands formed by alluvion soil is settled, and the following is an old rule much referred to : 'Measure the whole extent of the line on the river and ascertain how many feet each proprietor owned on this line ; divide the newly formed line into equal parts and appropriate to each proprietor as many of these parts as he owned feet in the old line, and then draw lines from the points at which the proprietors respectively bounded upon the old to the points thus determined as the points of division on the newly formed line.' Of course, this rule should be modified in particular cases, and under particular circumstances ; for instance, if the ancient margin has deep indentations or sharp projections, the general available line on the river ought to be taken, and not the actual length of the margin as thus elongated by the indentations."¹⁰

The doctrine of acquiescence in what has been done, or what is to be done is well recognized in law as the admission of a party. The commissioners in making their division and allotment are to take into consideration the acquiescence of the parties in what has been done relative to the premises, and to the improvement of such premises in the past, and, also, to take into consideration such admissions or agreements as have been made in relation to the division of the property or improvement of the

¹⁰ *Deerfield v. Arms*, 17 Pick. 41 ; *Sparhawk v. Bullard*, 1 Metc. 95 ; *Angell on Tide Waters*, 258.

property in the future. As for instance, it may have been agreed upon by all the parties in interest that some one of the co tenants shall have, in case of future division, set apart to him a certain parcel of land, and he, by reason of such agreement on the part of his fellow-co-tenant, has taken possession of the same, has built upon it, or set fruit-trees upon the land, thus having an equitable interest in such particular parcel so improved by him, greater than his interest therein as a co-tenant, and it being an interest that should be considered by the commissioners in making their allotment ; and the admission of the other co-tenants, or their acquiescence in the acts of the co-tenant thus improving such parcel, should estop all who are interested having thus acquiesced, in claiming, upon a division and allotment of the land, that the co-tenant thus improving said particular parcel should not be allowed the benefit of the acquiescence, admission, or agreement of his fellow-co-tenants. Such acquiescence, to have effect, must be some act of the mind and amount to voluntary demeanor or conduct of the party, as it may be an acquiescence in conduct as well as acquiescence in language. Such conduct or language must be fully understood by the party claiming benefit under it, before an inference can be drawn from the passiveness or silence of the opposite party.¹¹ It does not amount to a reservation where a benefit is given in a deed to persons not parties to it, and having no legal title, and where nothing is reserved to the grantor. But there is an intention, to which the court will give effect according to the intent which is to be gathered from the whole instrument. He who takes under a deed must perform all its express

¹¹ Greenl. Ev. 6, 197; 6 Carr. & P. 241; 9 Cow. 274; 1 Hall, 579; 9 Cow. 231; 2 Caines, 211; 8 Wend. 483, 610.

and implied conditions. His election precludes objection and becomes a matter of estoppel.¹² Where the equities of the case give some of the parties an interest in specific parcels, they are entitled to have the actual value of such parcels ascertained ; and a judgment directing that the value of the parcels assigned on account of such equities, shall be estimated at the same rate as the other parcels bring upon a sale, is an error, unless it appears by the record that it did not work injustice. The distribution of the proceeds of a sale should be according to the actual value of the whole premises, and it is very desirable that, in order to save expense to all parties, the decree should be corrected without a new trial, providing that the irregularities or mistakes in the decree are such as can be so corrected, and if necessary, the corrected decree should give new and correct directions to the commissioners.¹³

Under the various statutes of the United States, the proceedings subsequent to the interlocutory judgment are similar, and, in fact, nearly conform to the proceedings in chancery under the common law and the common law writ of partition. It is usual for the court to appoint from three to five commissioners. In New York State the rule is three commissioners, sometimes termed as referees, and sometimes as partitioners, whose duty it is to divide the property as between the co-tenants in common. Such commissioners have no power to determine questions pertaining to the title.¹⁴ The commissioners have no other work to do, or act to perform, or any authority to do any other act, than to divide the estate according to

¹² *Maynard v. Maynard*, 4 Edw. Ch. 711. See 34 Barb. 567; 5 N. Y. 38; 21 Wend. 290; 1 Prest. Shep. Touch. 80.

¹³ 4 Abb. Ct. App. Dec. 525.

¹⁴ *Allen v. Hall*, 50 Maine, 263. See 10 Wis. 320.

the directions contained in the interlocutory judgment ; and they must abide by the decree of the court as set forth in such judgment, and must fulfill in every particular the requirements of the court rendering such judgment, and be obedient to all its mandates.¹⁵ The law empowers them to employ, when necessary, a surveyor and such persons skilled in the science of surveying as may be necessary to assist the surveyor in the performance of his labors ; and if unskilled labor will do, then it becomes their duty as a matter of economy to the estate to employ to assist the surveyor such unskilled labor. The commissioners are not compelled to employ a surveyor, but they are allowed to use their discretion and supposed only to employ such persons to do that work which they, as commissioners, are unable to do. Undoubtedly in the majority of cases where actual partition is directed by the interlocutory judgment, it is best for the commissioners to employ to assist them a skilled surveyor, because they are bound by virtue of their appointment, by virtue of the mandate of the court making the interlocutory judgment, and by virtue of the fact that they are to make a proper and just division of the land, and to do actual justice to all parties concerned. And, while commissioners may be able to cipher out the amount that should go to each, thee, perhaps, being unskilled as to measurements of land, cannot correctly lay out the respective parcels, by metes and bounds, or place the necessary marks, stones or monuments, as required by law, marking the respective parcels as they are set apart and allotted to the co-tenants in severalty. It is not wise for the commissioners to make the allotment by having recourse to chance, and usually

¹⁵ *Brown v. Bulkley*, 11 *Cush.* 168.

they are allowed to make such allotments without depending on any chance to determine what persons shall have certain particular parcels.¹⁶

In some States, the method preferred by chancery is, first, to have the land divided by the commissioners in equal parts, and then the commissioners determine by lot to what co-tenant each part shall be assigned.¹⁷ According to the old chancery practice, which is generally followed at this time, the proceedings of the commissioners are open and public, and may be attended by any, or all of the parties concerned, their attorneys or solicitors; and in some instances witnesses may be examined and cross-examined, and such examination is under the control of the commissioners, and is deemed necessary for the purpose of discovering the actual truth in the premises.¹⁸ The first duty of the commissioners is to divide the land into as many shares or parcels as there are co-tenants, or as the decree directs. Then, they must allot those parcels to the respective co-tenants, taking into consideration all the circumstances, and they must use due care not to be arbitrary in their allotment.¹⁹ So far as they are able to do so, they should assign to each co-tenant that part or parcel of the land, which will be the most valuable to him in the future, taking into consideration all questions in regard to improvements both temporary and permanent. The assignment of the parcels should be done in such a manner as not to do an injustice to any of the other co-tenants.²⁰

¹⁶ *Cecil v. Dorsey*, 1 Md. Ch. 225. See *Field v. Hanscomb*, 3 Shep. 367; 23 Ind. 445; 15 Gray, 502; 1 Root, 69.

¹⁷ *Danl. Ch. Pr.* 1158, 4th ed.

¹⁸ *Cecil v. Dorsey*, 1 Md. Ch. 226, *ante*.

¹⁹ *Canning v. Canning*, 2 Drewry, 434.

²⁰ *Story v. Johnson*, 1 Y. & C. Ex. 546.

Difficulties sometimes will arise in the division of premises in such a manner that it will seem almost impossible to make a division, and yet do justice to the parties. In one case it appeared that the commissioners had set off to one of the parties one part of the premises, by metes and bounds, and another part of the premises to another in the same way; the whole embraced two mills upon the same stream, the one below the other. But in their report, in addition to the land itself on which the lower mill was situated, they had given to the party to whom that part of the land was set off, the easement or right to flow back the water assigned to the other, in the same manner and to the same extent that such water had been thus flowed back previous to the partition. The question there arose upon the construction of the report itself. But the decision of the court recognized the principle that the commissioners in partition might assign one part of the premises to a party, charged with a servitude or easement for the benefit of another party, to whom a distinct portion of the land was assigned by metes and bounds.²¹ And in a New Hampshire case, the committee appointed by the court to make partition of a mill-site and mill-privileges, assigned to some of the parties distinct portions of the premises, by metes and bounds, with the right of taking from the river, within the limits of the land assigned to them respectively, so much water as would flow through a gateway of certain prescribed dimensions, together with a passage way or water-course through other portions of the premises not assigned to them. And the court sustained the report of the committee; distinctly placing their decision upon the principle

²¹ *Hill v. Dey*, 14 Wend. 204.

of the common law upon the subject.²² The English rule was set forth in an opinion given by Lord Hardwicke, in 1750, in which such a mode of making partition of property, the principal value of which consisted in the use of water, was adopted.²³ ^d

The direction or determination by commissioners that the portion set off to a widow for dower should be sold on her death, is of no effect, as the court only can make such order.²⁴ The commissioners may, and they should take into consideration rights of dower, which have not been admeasured, or the interest of any person, who has an estate by the courtesy, for life, or for years, in any undivided share of the property, and the commissioners may, in considering such rights of dower or estate, allot to such a party his or her share of the property, without reference to the duration of the estate. And they may dispose of the share, so allotted to such party, among those who are entitled to the remainder or reversion thereof, the same to be enjoyed by them only at or after the expiration and determination of such right of dower or estate as tenant by courtesy, for life, or for years. Such an allotment should only be made, when in the opinion of the commissioners it can be done without prejudice or injury to the rights of the parties.

²² *Morrill v. Morrill*, 5 N. H. 134.

²³ *Warren v. Baynes*, 2 Blunt Amb. 589. See *Clarendon v. Hornby*, 1 Peer Wms. 446; *Lister v. Lister*, 3 Y. & C. Ex. 540.

^d The following cases will be of interest relative to questions pertaining to the commissioners and their duties. 11 *Cush.* 168; 3 *Shep.* 367; 23 *Ind.* 445; 15 *Gray*, 502; 1 *Root*, 69; 102 *Ill.* 507; 1 *Peer Wms.* 446; 7 *H.* 118; 35 *Me.* 102; 30 *Me.* 219; 10 *Paige*, 448; 14 *Wend.* 204; 5 *N. H.* 134; *Ark. Dig.* ed. 1884, § 4797, 4799; 32 *Me.* 137.

²⁴ *Post v. Post*, 65 *Barb.* 192, *ante*.

^e Where a party has a right of dower in the property, or a

All of the commissioners must meet together in the performance of any of their duties : but a majority of them may act, and the acts of the majority are binding. They must make and file a report when they shall have completed their allotments. This report must show what they have done, and the proceedings had before them.²⁵ It should contain a full, careful and accurate description of the parcels of land as separated and divided out from the whole, and a statement to whom each parcel was allotted. It must show how the property has been divided, and that they have obeyed the directions of the court as set forth in the interlocutory judgment. This report must be in writing, and signed. It must be acknowledged before some officer who takes acknowledgments, in like manner as a deed or mortgage is acknowledged, and filed with the clerk of the court.^f The commissioners' report

part thereof, which has not been admeasured, or has an estate by the courtesy, for life or for years, in an undivided share of the property, the commissioners may allot to that party his or her share of the property, without reference to the duration of the estate. And they may make partition of the share, so allotted to that party, among the parties, who are entitled to the remainder or reversion thereof, to be enjoyed by them upon the determination of the particular estate, where, in the opinion of the commissioners, such a partition can be made without prejudice to the rights of the parties. N. Y. Code Civ. Pro. § 1553; N. Y. Laws 1847, ch. 430; 4 Edm. 614.

²⁵ 32 Me. 137.

^f All of the commissioners must meet together in the performance of any of their duties; but the acts of a majority so met are valid. They, or a majority of them, must make a full report of their proceedings, under their hands, specifying therein the manner in which they have discharged their trust, describing the property divided, and the share or interest in a share, allotted to each party, with the quantity, courses, and distances, or other particular description of each share, and a description of the posts, stones, or other monuments; and specifying the items of

should be signed by all, and should state that all met. If not signed by all, a reason for the omission should be stated.²⁶ The commissioners shall specify in their report the manner in which they executed their trust, and shall give a description of the posts, stones, or monuments placed by them for the designation of the allotted parcels.²⁷

The expenses of the commissioners, including the expense of a surveyor and his assistant, when such shall be employed, shall be ascertained and allowed by the court; and the amount of such expenses, together with the fees allowed by law to the commissioners, shall be paid by the petitioners, and shall be allowed to them as part of the costs to be taxed.²⁸ A commissioner cannot maintain a suit for his fees, or compensation, till taxed by the court. The fees must be determined by the court.²⁹ On a motion to adjust the fees and disbursements of the commissioners, the number of days' service actually and necessarily rendered by each commissioner, and the actual disbursements made by them, must be shown by affidavit.³⁰ Each commissioner is entitled to compensation at the rate of two dollars per day only for the time he was actually and neces-

their charges. Their report must be acknowledged or proved, and certified, in like manner as a deed to be recorded, and must be filed in the office of the clerk. N. Y. Code Civ. Pro. § 1554.

²⁶ Underhill *v.* Jackson, 1 Barb. Ch. 73.

²⁷ See 44 Barb. 372.

²⁸ The fees and expenses of the commissioners, including the expense of a surveyor, when it is made, must be taxed under the direction of the court; and the amount thereof must be paid by the plaintiff, and allowed as part of his costs. N. Y. Code Civ. Pro. § 1555.

²⁹ Smyth *v.* Bradstreet, 5 Cow. 213. See 15 Johns. 482; 16 Id. 40; 1 East, 497; 2 Binn. 138; 9 Johns. 114; 1 Chitty Pl. 10.

³⁰ Campbell *v.* Campbell, 48 How. Pr. 255.

sarily employed in the duties of his office. The affidavits used on a motion to adjust the fees and expenses of commissioners must show, in detail, the number of day's service actually and necessarily performed by each commissioner, and, also, the actual disbursements made by the commissioners, together with the necessity of incurring them. It seems that the general view was, that the fees of the commissioners should be two dollars per day for each and every day's actual and necessary service. Each surveyor, employed by the commissioners, as prescribed by law, is entitled to five dollars, for each day actually and necessarily occupied in the surveying, laying out, marking, or mapping land, by virtue of such employment; and each assistant, so employed, is entitled to two dollars for each day actually and necessarily occupied in surveying under the surveyor's direction as aforesaid; and each commissioner, appointed by virtue of the New York Code of Civil Procedure, to make partition or admeasure dower, is entitled to five dollars per day for each day's actual and necessary service.^h This, it seems, would differ somewhat from the opinion given by Justice Lawrence in the case of *Campbell v. Campbell*, above cited, wherein he says: "No greater sum can be allowed to the commissioners than two dollars for each and every day's actual and necessary service." The opinion of Judge

^h A surveyor, employed as prescribed by law, in an action for partition or dower, or to determine dower, is entitled to five dollars for each day, actually and necessarily occupied in surveying, laying out, marking, or mapping land therein. Each assistant, so employed, is entitled to two dollars for each day, actually and necessarily occupied in serving under the surveyor's direction. Each commissioner, appointed as prescribed by law, to make partition or admeasure dower, is entitled to five dollars for each day's actual and necessary service. Code Civ. Pro. § 3299.

Lawrence is not based upon the Code of Civil Procedure, but upon the general custom and usage that governed previous to the adoption of the Code.

The report of the commissioners must be brought into court, and the court must confirm or set aside the same.¹ On good cause shown, the court must set aside the report, and appoint new commissioners as often as it may be necessary, who shall proceed in like manner as above directed. The new commissioners shall be governed and controlled by the interlocutory judgment the same as the commissioners appointed by that judgment, their duties and responsibilities being the same. The report of the commission is not final. It may be set aside by the court.²⁹ Confirmation of the report will be denied, as a matter of course, when it is shown to the court that the commissioners were unfair in making their allotments and in the performance of their duties, by virtue of the trust reposed in them, or where fraud has been exercised upon the part of any one or more of the commissioners, and favoritism shown to one or more of the co-tenants, thus injuring the other co-tenants. It is the duty of the commissioners, when they are in doubt as to their duties and desire information, to apply to the court for its instruction.³⁰ If the court erroneously refuse to sustain exceptions to a report, the remedy is not by motion for a new trial, but by reserving an exception to the refusal of the court to set aside the report.³¹

¹ The court must confirm or set aside the report, and may, if necessary, appoint new commissioners, who must proceed as directed in this article. N. Y. Code Civ. Pro. § 1556.

²⁹ Freem. on Co-ten. § 525; Rev. Code of Ala. § 3115; Rev. Code of Miss. § 1821.

³⁰ McLaughlin *v.* Circuit Judge, 23 N. W. R. 472.

³¹ Freem. on Co-ten. § 526.

CHAPTER XVI.

RECEIVER IN PARTITION.

A RECEIVER will be appointed before final judgment, on the application of a party in interest who establishes an apparent right to the property, or a portion of it, or an interest in it, and where the property is in the possession of the adverse party, and there is danger that it will be removed beyond the jurisdiction of the court, destroyed, lost, or materially injured, or if it should be that kind of property which of itself renders an income or revenue, then the court will appoint a receiver, for the purpose of governing and controlling that income or revenue, and keeping it safe until the final result of the action. After final judgment, a receiver may also be appointed to carry into effect the judgment, or to care for and protect the property, or the rents, issues, income, or profits of the property until the final judgment shall have been fully carried into effect.¹

A receiver will be appointed where the defendant or a defendant in the action has absconded and left the State, for the purpose of avoiding the service of the summons upon him.² This would especially be so where one absconded abandoning the real property, as it would be

¹ N. Y. Code Civ. Pro. § 713.

² *People v. Norton*, 1 Paige, 17.

necessary that some person should take possession of the real property, in trust, for those who are the tenants in common, that the products, rents and profits of such land may be protected. The receiver is appointed in order to preserve the property from serious loss.³ The appointment of the receiver is generally of the rents and profits of the real estate, and where a receiver was appointed of the rents and profits as aforesaid, a part of which rents and profits was not in controversy in the suit in which the receiver was appointed, but belonged to a third person, not a party to the suit, in right of his wife, and upon the application of the husband for the payment of that part of the fund to him, the wife came in and claimed it, on the ground that her husband had violated the marriage contract, and that she had filed a bill for divorce and for a restoration of her property acquired by the marriage ; the court refused to decide the question between the husband and wife upon that application ; but the shares of the rents and profits belonging to them were directed to be paid into court by the receiver, to the credit of the suit between the husband and wife, to abide such order or decree as should be made in that suit respecting the same. Although the Court of Chancery will not permit the possession of its receiver to be disturbed by a third person who is not a party to the suit, it will, upon the application of such third person, give such directions to the receiver relative to his trust as may be necessary to protect the rights of such third person.⁴

In an action brought to obtain partition, where a

³ *Pignolet v. Bushe*, 28 How. 9 ; *Stillwell v. Watkins*, 1 Jacob, 280.

⁴ *Vincent v. Parker*, 7 Paige, 65. See 34 Barb. 553.

receiver, pending the litigation, was appointed, with directions to collect the rents and divide the net proceeds thereof between the plaintiff and defendant. Thereafter one Man, having recovered a judgment against the defendant upon which an execution had been issued and returned unsatisfied, applied for an order, directing the receiver to pay the amount due on the judgment to him, from the defendant's share of the rents. This application was denied, and the court held that the remedy of the judgment creditor was to come into the action and press it to a judgment, after which his claim might be paid from the proceeds of the sale of the premises, or, if an actual partition was decreed, the share set off to the judgment debtor might be sold.⁵ Where, in an action to set aside conveyances of real estate as obtained by fraud, an interlocutory judgment having been rendered determining the title to be in plaintiff, subject to certain liens of defendant, and directing an accounting, and where, by consent, a receiver has been appointed to receive the rents during the accounting, it is within the discretion of the court to order the receiver to pay over the rents collected to the plaintiff upon such terms as it may deem proper.⁶

Where, in a partition suit, one of the parties in interest has in his possession a portion of the estate, and has been in the habit of collecting the rents or receiving the profits of such estate, and as he alleges the collection of such rents and the receipt of such profits by him was for the protection of the income from waste, a receiver should not be appointed upon affidavit, upon information

⁵ *Verplanck v. Verplanck*, 22 Hun, 104; citing 7 Paige, 65; 28 How. Pr. 9.

⁶ *Platt v. Platt*, 66 N. Y. 360. See 52 N. Y. 583; 2 Dan. Ch. Pr. 1777.

and belief, that such party is of little or of no responsibility. There is nothing in such an affidavit, and no facts presented to the court that warrant the conclusion that a receiver is necessary for the protection of the income from waste. The defendant, as tenant in common, was entitled to the possession of the premises the same as the other tenants in common, and he is liable upon the settlement of the estate to his fellow co-tenants, and must account for his possession of the property, and for the rents and profits received by him. Therefore, something more than an allegation is needed, upon information and belief, that such a party is of little or no responsibility.⁷ If one tenant in common oust his co-tenant and use the whole property, accompanied by an exclusion, refusing his co-tenants any use of the premises, an account will be decreed, and, if need be, a receiver will be appointed, whether the action brought be in the nature of an ejectment or partition.⁸

In an action for partition, where one of the co-owners is in occupation, though not in exclusive occupation, of the property, the court has jurisdiction to appoint a receiver until the hearing.⁹

A receiver may be defined to be an indifferent person between the parties, appointed by the court to take possession of the property which is the subject of litigation, and to hold the same and apply the profits, or to dispose of the property itself under the direction of the court,

⁷ *Dargin v. Wells*, 13 N. Y. Week. Dig. 51.

⁸ *Isreal v. Isreal*, 13 Md. 120. See 1 Barb. 58; 5 Madd. 223; 11 N. J. Eq. 403; 28 Iowa, 501; 1 Metc. 459; 15 Grant, 247; 20 Id. 221; 21 Mo. 428; 15 Fla. 424; 14 Ga. 429; 44 Vt. 336; 30 Mich. 237; 12 Upper Can. L. Jour. 203.

⁹ *Porter v. Lopes*, 23 Moak Eng. 631; citing 30 Beav. 109; 33 Id. 401.

when it does not seem reasonable to the court that either party should do it, or where a party is incompetent,—as in the case of an infant.¹⁰

The appointment of a receiver is usually made to prevent fraud, to protect the property from injury, or preserve it from destruction.¹¹ A receiver will be appointed, when it becomes necessary, at the commencement of a suit, or at any time during its pendency, or even after some decree or judgment has been made.¹² A receiver may be appointed of the rents and profits of real estate, and of such personal property as may be involved in the action.¹³ A tenant in common may have a receiver appointed of the property held in common, upon showing to the court that his co-tenants are insolvent, that they are in possession, and are excluding him from receiving any portion of the rents and profits, or from enjoying the premises, or any part of them.¹⁴ The court may, in its discretion, order the tenant in possession, who has been receiving the rents and profits, to give security for the payment of the due proportion of such rents and profits belonging to his fellow co-tenants.¹⁵ A receiver will not be appointed in an action between co-tenants, except in case of waste or exclusion.¹⁶ It is an exclusion, and a reason for the appointment of a receiver, when the co-tenant in pos-

¹⁰ *Bur. L. Dict.*; *Danl. Ch. Pr.* 1552; *5 Wait Act. & D.* 353; *Evans v. Coventry*, 3 *Drew.* 80.

¹¹ *Baker v. Backus*, 32 *Ill.* 79.

¹² *Henshaw v. Wells*, 9 *Hump.* 568; *Crane v. McCoy*, 1 *Bond.* 422.

¹³ *Chaplin v. Young*, 33 *Beav.* 330. See 4 *Sim.* 572; 37 *Penn. St.* 217; 3 *Russ.* 105; 18 *Md.* 193; 37 *How. Pr.* 222.

¹⁴ *Williams v. Jenkins*, 11 *Ga.* 595.

¹⁵ *Street v. Anderton*, 4 *Bro.* 414.

¹⁶ *Billinghurst, Ex parte, Amb.* 104.

session received all the rents and profits and refused to pay over to the others the share or shares due them.¹⁷ Where several tenants in common are infants, often-times a receiver will be appointed for the purpose of protecting that share of the rents and profits which belong to the infants.¹⁸

¹⁷ *Sandford v. Ballard*, 33 Beav. 401.

¹⁸ *Smith v. Lyster*, 4 Beav. 227.

CHAPTER XVII.

FINAL JUDGMENT.

THE report of the commissioners must be brought into court for action by the court thereon. If the report be confirmed, a final judgment must then be rendered to the effect that the partition be firm and effectual forever, which judgment is binding and conclusive upon all the defendants upon whom summons was served, either personally, or without the State, or by publication, pursuant to an order obtained from the court for that purpose ; and upon each person claiming from, through, or under either, or any of the parties, so personally served, or served without the State, or by publication, as aforesaid, who have obtained an interest in, or a lien upon, or a title to, any part or portion of the premises since the filing of the notice of pendency in the clerk's office of the county where the land subject to the action is situate ; and each person, not in being when the interlocutory judgment is rendered, but who thereafter, by reason of any contingency, becomes entitled to a beneficial interest attaching to the estate, or any part or portion of the estate.

The right, or portion, or interest of any one may be expressly reserved and left unaffected by the interlocutory judgment. In such a case the right, interest, share, or portion of the person so reserved is not affected

by the final judgment, nor bound by any act that occurs for the rendering of the interlocutory judgment ; or any person who claims an interest in or to such property, or any person who obtained an interest by, through, or under such person, whose right, title, or interest has been reserved by the interlocutory judgment is not affected by any of the subsequent mandates or judgments in the action.^a The Revised Statutes provide that such judgment shall be binding and conclusive "On all parties named therein, and their legal representatives, who shall, at the time, have an interest in the premises divided, as owners in fee, or as tenants for years, or as entitled to the reversion, remainder or inheritance of such premises after the termination of any particular estate therein ; or who, by any contingency contained in any will or grant or

^a Upon the confirmation, by the court, of the report of the commissioners making partition, final judgment, that the partition be firm and effectual forever, must be rendered, which is binding and conclusive upon the following persons :

1. The plaintiff ; each defendant upon whom the summons was served, either personally, or without the State, or by publication, pursuant to an order obtained for that purpose, as prescribed in chapter fifth of this act ; and the legal representatives of each party, specified in this subdivision. So much of section 445 of this act, as requires the court to allow a defendant to defend an action, after final judgment, does not apply to an action for partition.

2. Each person claiming from, through, or under such a party, by title accruing after the filing of the judgment-roll, or after the filing, in the proper county clerk's office, of a notice of the pendency of the action, as prescribed in article ninth of this title.

3. Each person, not in being when the interlocutory judgment is rendered, who, by the happening of any contingency, becomes afterwards entitled to a beneficial interest attaching to, or an estate or interest in, a portion of the property, the person first entitled to which, or other virtual representative whereof, was a party specified in the first subdivision of this section. N. Y. Code Civ. Pro. § 1557.

otherwise, may be or may become entitled to any beneficial interest in the premises; or who shall have any interest in an undivided share of the premises, as tenant for years, for life, by the courtesy, or in dower; on all persons interested in the premises, who may be unknown, to whom notice shall have been given of the application for partition, by such publication as is hereinbefore directed; and, on all other persons claiming from such parties, or persons or either of them."¹

In general, the law will protect all dower, interest, or estate, held by courtesy or for life, and such judgment of partition rendered as set forth by the section of the Code just cited, and that part of the Revised Statutes above quoted, shall not affect any tenants, or persons having claims as tenants, in dower, by the courtesy or for life, to the whole of the premises, which shall be the subject of such partition; and such judgment shall not preclude any person, except as specified in the section of the Code referred to and the Revised Statutes as aforesaid, from claiming any title to the premises in question, or from controverting the title or interest of the parties between whom such partition shall have been made.² The court has no authority, in a partition suit, to order a sale of the premises, unless it shall be satisfied that they are so situated that a partition thereof cannot be made without great prejudice to the owners; and arrears in the payment of taxes and assessments furnish no ground for ordering a sale by partition.³

¹ 3 R. S. 6 ed. 589, § 44.

² R. S. 6 ed. 589, § 45. See 1 Barb. 560; 15 N. Y. 617; 11 How. Pr. 490; 1 Hill, 141; 11 Wend. 647; 17 Id. 488; 9 Barb. 500; 65 Id. 195; 1 Edw. Ch. 630.

³ *Fleet v. Dorland*, 11 How. Pr. 489.

Upon the return of the report of the commissioners, a motion may be made to set that report aside. If that action should be denied by the court, or if no motion of that kind should be made, and the court is satisfied that the report is correct, the next step is to have final judgment or decree entered thereon. In some States of the Union, an actual partition is fully consummated by the entry of this final judgment or decree; it is unnecessary for conveyances to be subsequently executed by the parties. This rule is general, or nearly so. The result of the judgment under such a rule is to vest the title, which previously had been held in common, in severalty in the various persons to whom the respective allotments of parcels of land have been made, and it is claimed that such title will relate back to the date of the filing of the commissioners' report after the same has been duly confirmed by the court. Undoubtedly, the title has relation back to the time of the division, and starts from that time; the same as the title of an administrator relates back to the time of the death of his intestate. This is a necessity for the more complete protection of estates.⁴ Where land was conveyed, and the grantee entered into possession, and afterwards proceedings were had in partition, in relation to the same premises, to which the grantee was not a party, and the premises were sold by commissioners appointed by the court, and conveyed by them to the purchaser; it was held that the first grantee was not precluded, by the proceedings in partition, from controverting the right of the subsequent purchaser, and

⁴ *Young v. Frost*, 1 Md. 403; *Wright v. Marsh*, 2 Greene, 110. See 16 Ill. 126; 9 Barb. 503; 3 Grant Cas. 381; 3 Johns. Ch. 295; 6 Dana, 417; 8 Jones, 451.

that, his possession being adverse, the deed from the commissioners was void.⁵

Under our New York statutes an actual partition or sale under a judgment in partition is effectual to bar the future contingent interests of persons not *in esse*, though no notice is published to bring in unknown parties, and though such future owners may take as purchasers under a deed or will, and not as claimants under any of the parties to the action. Independent of the statute, contingent remaindermen, or persons to take under an executory devise, who may hereinafter come into being, are bound by the judgment as being virtually represented by the parties to the action in whom the present estate is vested.⁶ A judgment in partition is binding upon all the parties, though minors or non-residents, if the court acquire jurisdiction of them, and of the subject-matter.⁷

In an action for partition by one of several tenants for life, a sole owner of the estate in remainder, who was a non-resident, was made a party defendant, an order for service upon him by publication was obtained, the summons and complaint were served upon him personally, without the State; he did not appear, and judgment was perfected, adjudging that the premises be sold, and charging the estate in remainder with the payment of a portion of certain taxes and assessments. It was held in this case, that the court had jurisdiction, that a judgment was conclusive, as against the remaindermen in favor of the

⁵ *Jackson v. Vrooman*, 13 Johns. 488. See 2 Johns. Cas. 58; 2 Cai. 183; 9 Johns. 163; 10 Id. 164; 2 Barb. 159.

⁶ *Mead v. Mitchell*, 17 N.Y. 210; citing *Calv. on Parties*, 48; *Story Eq. Pl.* 144; 2 Y. & C. 595; 6 Ves. 498; 6 Sim. 643; 7 Paige, 554; 1 Edw. 629; 2 Hoffm. Ch. 161; 2 Barb. Ch. 287.

⁷ *Clemens v. Clemens*, 37 N. Y. 59, *ante*.

purchaser at a sale under the judgment ; and that in an action brought by said purchaser against one who had contracted to purchase a portion of premises, for specific performance of the contract, the defendant could not be heard in impeachment of the judgment.⁸ The term real estate, as used in the statute, includes every freehold estate and interest in land—that is, an estate in fee or for life ; and is declared to include every estate, interest and right, legal and equitable, in lands, tenements and hereditaments, except such as are determined or extinguished by the death of an intestate seized or possessed thereof, or in any manner entitled thereto, and except leases for years and estates for life of another person. This is but an elaboration of the common-law definition of real estate.⁹

Under the statutes of this State, when all of the parties in being having any estate or interest, present or future, vested or contingent, in the lands, are made parties to an action for partition, a purchaser at a sale under a judgment therein acquires a perfect title. The judgment is conclusive as to the rights of all, and the sale is effectual to bar the future contingent interests of persons not *in esse* at the time, although no notice is published to bring in unknown parties, and although such future owners may take as purchasers, under a deed or will, and not as claimants under any of the parties to the action. That such judgment was conclusive as to the rights of all, is well established by authority. A tenant in common is not debarred from bringing a bill of partition individually, merely because he is a trustee as to another part. There

⁸ Jenkins *v.* Fahey, 73 N. Y. 355.

⁹ 9 Kent Com. 401; Merry *v.* Hallet, 2 Cow. 497.

can be a partition or sale notwithstanding other persons may come *in esse*. Future contingent interests, not *in esse*, may be barred by a sale under a judgment in partition.

The decree should settle the rights of all the parties to the proceedings, and not leave a portion of the property to be the subject of another proceeding in partition. Partition severs tenancy, but does not enlarge the estate. The final judgment must direct that each of the parties, who is entitled to the possession of any parcel of land allotted to him, be let into the possession of such land. This possession such party is entitled to immediately after the determination of the particular estate, as the case may require.^b The judgment may direct the delivery of the possession of the property thus allotted to the person entitled to the possession there-to; and if the party, or his representative or successor, who is bound by the judgment, withholds possession from the person who is entitled to such possession, the court, besides punishing such party for disobedience as in contempt, may, in its discretion, require the sheriff to put the proper person into possession of the property to which he is entitled by virtue of the judgment. Such an order is executed as if the same was an execution for the delivery of the possession of the property.¹⁶ In one case cited under the same section of the Code, where a person who was proved to be insolvent, was in possession of mortgaged premises, which were claimed by another, under a decree of foreclosure and sale to him, and the per-

^b The final judgment must also direct that each of the parties who is entitled to possession of a distinct parcel allotted to him, be let into the possession thereof, either immediately, or after the determination of the particular estate, as the case requires.

¹⁶ N. Y. Code Civ. Pro. § 1675.

son so in possession filed a bill to redeem the premises, on the ground that he was not a party to the bill of foreclosure, the court directed a receiver to be appointed to receive the rents and profits of the premises, pending the litigation, unless the complainant should elect to deliver up the possession, or give security for the rents and profits, or pay into court the mortgage money admitted to be due.¹⁷ In this case one claimed a right to the possession of the premises under a title paramount to the rights acquired by the filing of the bill against the defendant Colden. The chancellor said that when he obtained that possession by due course of law, it related back to the recovery of the judgment, or at least to the issuing of the execution.

If the judgment of partition is not conclusive as to title, it is only because the question of title does not arise as an issue in the action under the laws of the State in which the partition is bought. Because, it is a general rule, both at common law and in suits under the statute, that the judgment is conclusive upon all issues determined by it, and that rule is applicable to judgments rendered in partition cases, the same as it is applicable to judgments in other forms, or kinds of action.¹⁸ The question of possession is always an issue, and it is generally believed that the common law action of partition is an action possessory in its nature, when the principal action at issue and the principal question settled by the judgment is the possession of the co-tenants in common; and the title does not come up either directly or indirectly as an issue in the action, or the question settled

¹⁷ *Frelinghuysen v. Colden*, 4 Paige, 203.

¹⁸ *Dixon v. Warters*, 8 Jones, 450; *Foxcroft v. Barnes*, 29 Me. 129; *Rabb v. Aiken*, 2 McCord Ch. 125.

upon by the judgment. In case of default, a party to the suit is estopped from showing that at the time of the partition he was holding any part of the lands in question in severalty adversely to his other co-tenants, or that the complainant or petitioner, as he is often termed, had no interest, either directly or indirectly, in the property in question.¹⁹

By the wording of the New York statutes one can readily see that the question of title becomes an important issue in all cases of partition. The old statute before the enactment of the present Code read: "When several persons shall hold and be in possession of any lands, tenements or hereditaments, as joint tenents, or as tenants in common, in which one or more of them shall have estates of inheritance, or for life or lives, or for years, any one or more of such persons, being of full age, may apply, by petition, to the Supreme Court or to the county court of the county, or the mayor's court of the city where the premises are situated, for a division and partition of such premises, according to the respective rights of the parties interested therein, and for a sale of such premises, if it shall appear that a partition thereof cannot be made, without great prejudice to the owners."²⁰ Section 1532 of the New York Code of Civil Procedure uses the term "hold and are in possession." It seems almost impossible to construe the word "hold" to refer to anything else than the title, as one would naturally,

¹⁹ Cole *v.* Hall, 2 Hill, 627; 39 Iowa, 601; 4 Allen, 376.

²⁰ 3 R. S. 6 ed. 583, § 1. See 46 N. Y. 185; 65 Barb. 241; 3 Daly, 186; 1 N. Y. S. C. 125; 3 Hun, 736; 6 T. & C. 434; 4 Hun, 199; 17 N. Y. 217; 15 Id. 623; 12 Id. 616; 3 Barb. 576; 5 Denio, 385; 3 Paige, 245; 1 Ed. 567; 5 Cow. 295; 17 How. Pr. 52; 14 Abb. Pr. 258.

in reading both the Revised Statutes and the Code, ask what that word refers to. If it only refers to possession, then why use the term "hold and are in possession?" Hold what? Why, the title! Meaning persons who *hold* the title and are in *possession* of the premises as co-tenants, or, as tenants in common, may apply to the court, in the manner prescribed by the Code, for partition, thus bringing directly before the court the question of the title to the premises, which becomes an element together with the question of possession, which must be passed upon by the courts, so that a judgment properly rendered would be binding upon all questions pertaining to the title of the premises, and to the possession of the same, arising under the terms *hold and possess*, as used in the statute and the Code, making the question in New York State, and in most States where the action of partition is governed by statute, a higher action than one that is merely possessory in its nature,—that is, an action adjudicating and dividing the original title to the premises between the co-tenants thereof.

The judgment binding those questions or issues which arise in the case relative to the title and possession of the parties in interest, meaning those who are made parties to the suit, it is also binding upon any person who may acquire an interest from any of these parties to the action, after the rendering of an interlocutory judgment. And in those States where a notice of pendency of action is filed with the complaint in the county or district clerk's office, the judgment is binding upon those who acquire an interest from any party to the action after the filing of such notice of pendency, and those parties are estopped from asserting that they have a lien or claim upon the

premises. When the matter has been settled by such judgment, although it has been done by reason of the default of the parties or any part of them, the preponderance of the authorities is undoubtedly in favor of the legal theory that each co-tenant, who has lost possession or has been evicted by reason of a compulsory partition, may call upon his co-tenants to contribute their proportions of his loss, by reason of his losing such possession or his being so evicted, and each co-tenant is, by his obligation of warranty, estopped from asserting an independent adverse title, and the judgment is supposed to fix and sustain the rights of each co-tenant in accordance with the equities surrounding the case.²¹ The judgment of partition will give to the purchaser no better title than the co-tenants receive by reason of the death of their common ancestor, or no better title than the co-tenants receive from the person who transfers to them the title of the premises.

The final judgment or decree in partition may be corrected, as it is not exempt from interference, and is within the controlling powers of courts of equity. A mistake of facts,—such as a misstatement of the rights of one or more of the parties to the action, or an improper allotment, not in accordance with the report of the commissioners, or a description of one or more parcels by metes and bounds, which do not correctly describe the land,—are all subject to correction by the court rendering the judgment. Any mistake of facts, such as would authorize a court of equity in enjoining or setting aside an ordinary judgment,

²¹ *Woodbridge v. Banning*, 14 Ohio, 330; *Walker v. Hall*, 15 Id. 362. See 50 Mo. 592; 74 Ind. 283; 2 Allen, 122; 38 Am. Dec. 380.

will authorize it, in many instances, to correct a judgment or decree of partition.²²

An invalid and imperfect partition may become binding by reason of the acquiescence of the parties, especially, when those parties had knowledge of the invalidity of the partition, or knowledge of those things which made it imperfect. That acquiescence would go so far as to estop the parties from raising questions in reference to such invalid or imperfect partition as would be of injury to the adverse party, who had been acting upon and relying on such acquiescence.²³ A decree of partition not appealed from in court of probate is conclusive upon the parties and their privies as to the state of the title at the time of its rendition, and constitutes a bar to a claim of a greater interest in the land than the share decreed to them.²⁴ Where the return of a levy shows that an undivided half of the lot specified was set off, the subsequent statement that it was set off by metes and bounds can have no effect.²⁵ It has been held that such a levy shows a want of understanding or a heedlessness that it is inconsistent with the requirements of a valid levy.²⁶ A fee simple is the largest estate known to the law; and when the term is used with no qualification or limitation added, it does imply an estate owned in severalty. So when a person owns in common with another, he does

²² *Freem. on Co-ten.* § 534; *Ross v. Armstrong*, 25 Tex. 372; 12 *Penn. St.* 260.

²³ *Jackson v. Richtmyer*, 13 *Johns.* 376; 24 *Tex.* 439; 8 *Met.* 370; 12 *Me.* 198.

²⁴ *Davis v. Durgin*, 2 *N. Eng. R.* 910; *Morgan v. Dodge*, 44 *N. H.* 255; 22 *Id.* 412; 12 *Allen*, 600.

²⁵ *Peaks v. Gifford*, 2 *N. Eng. R.* 878.

²⁶ *Chase v. Williams*, 71 *Me.* 190.

not own the entire fee, or any fee simple. It is a fee divided or shared by one or more.²⁷

The final judgment must award the costs in the action, and must direct that each defendant pay to the plaintiff his share of the plaintiff's costs, including any extra allowance, which may be fixed by the court. If any one or more of the defendants are unknown, the share and proportion of the costs of the unknown defendants must be fixed and specified in like manner. And an execution may be issued for the collection of the costs awarded against any unknown defendant, the same as if he was named in the judgment; and the right, share, or interest in the property, allotted to him, may be sold by virtue of such execution, for the purpose of satisfying the same, and for the purpose of collecting the plaintiff's costs.^o A sale of the premises upon such execution shall be as valid, as if such unknown owner had been named in the proceedings and in such execution.²⁸ The court has no discretionary power to charge either party with the entire costs on the ground that he unreasonably refused

²⁷ *Brackett v. Ridlon*, 54 Me. 434; *Boynton v. Grant*, 52 Me. 220; *Stinson v. Rouse*, 52 Me. 261; *Pendergrass v. York Mfg. Co.*, 76 Id. 512. See 56 Me. 224; 67 Id. 591; 71 Id. 196; 77 Id. 401.

^o The final judgment for the partition of the property must also award, that each defendant pay to the plaintiff his proportion of the plaintiff's costs, including the extra allowance. The sum to be paid by each must be fixed by the court, according to the respective rights of the parties, and specified in the judgment. If a defendant is unknown, his proportion of the costs must be fixed and specified in like manner. An execution against an unknown defendant may be issued to collect the costs awarded against him, as if he was named in the judgment; and his right, share or interest in the property may be sold by virtue thereof, as if he was named in the execution.

²⁸ 3 R. S. N. Y. 6 ed. 595, § 72.

to make partition by deed.²⁹ A doweress, when properly a party to the suit, is chargeable with a proportion of the costs.³⁰ The question of the defendant's proportion of costs may be left until a further determination by the court, when his right or interest in the premises remains settled.³¹ As a general rule, the defendants who receive none of the lands should not be charged with costs. When the plaintiff makes persons defendants who have no interest in the subject-matter of the suit, the costs of such defendants will not be charged upon the fund or against their co-defendants, but must be paid by the plaintiff personally, unless such unnecessary parties are brought in at the request of the other defendants.³²

The attorney of the plaintiff acquires a lien for his disbursements, on plaintiff's share in the property in suit, of which the plaintiff cannot divest him by an assignment of his interest pending the action.³³ If the plaintiff cause litigation by setting up an unfounded claim, he will be charged with the additional costs of such claim.³⁴ The costs should be apportioned between the complainant and the other parties, according to their respective rights and interests in the premises as ascertained and settled by the decree; and the final decree should also direct that the several parties entitled to such costs have execution therefor, according to the course and practice of the court in which such decree is rendered. In partition suits where an actual partition of the premises is decreed, the costs of

²⁹ McCowan *v.* Morrow, 3 Code R. 9.

³⁰ Tanner *v.* Niles, 1 Barb. 560.

³¹ Phelps *v.* Green, 3 Johns. Ch. 302.

³² Hamersley *v.* Hamersley, 7 N. Y. Leg. Obs. 127.

³³ Creighton *v.* Ingersoll, 20 Barb. 541.

³⁴ Crandall *v.* Hoysradt, 1 Sandf. Ch. 40.

the complainant, and of all the defendants who appeared in the cause, are to be taxed as between party and party, and the aggregate amount of the several bills apportioned and charged upon the parties to the suit, according to their respective rights and interests in the premises; and the parties whose taxed bills exceed their ratable proportion of the whole costs, are entitled to execution against those whose tax bills are less.³⁵ Where there is a sale of the property, each side is entitled to costs; but where there is actual partition, the right of both sides to costs is a subject of serious doubt.³⁶

So far in this chapter we have treated of an actual division of the property, and an allotment to each co-tenant of his or her respective share. In case a partition and actual division of the property cannot be had, then it must be sold and the proceeds thereof divided. The sale of the property and division of the proceeds we must now consider. In England, and in this country, the power of the courts has been enlarged, and they are no longer compelled to order a partition of the land in question, when that course is injurious to the parties in interest.³⁷ The applicants for a sale of the premises must show that the land is so located that it cannot be divided or parcelled off among the co-tenants, without injury to their interests, or, in other words, that the dividing and parceling of the estate would be ruinous to those who own as co-tenants. The preponderance of the proof is upon the one who asks for a sale, and it is for him to show the facts

³⁵ *Tibbits v. Tibbits*, 7 Paige, 204.

³⁶ *Weed v. Paine*, 4 Civ. Pro. R. 305; 31 Hun, 10. See N. Y. Code Civ. Pro. § 1579; 13 Abb. N. C. 204.

³⁷ *Freem. on Co-ten.* 536.

necessary and requisite to give the court jurisdiction to order a sale of the land instead of a partition.³⁸

If the commissioners report that the property, or any part of it, cannot be partitioned, without great prejudice to the owners, and if that report is just and correct, and the court be so satisfied that it is correct, then the premises or that part of the premises that cannot be partitioned, will be decreed to be sold by the final judgment, or a supplemental interlocutory judgment will be rendered, reciting the facts, and directing that the property be sold by a referee, designated in the judgment for that purpose, or by the sheriff.³⁹ The New York Revised Statutes provide that instead of appointing commissioners in the first instance to make partition, if it shall appear, by the report of a master or otherwise, that the premises or any part thereof are so circumstanced that a partition cannot be made without great prejudice to the owners, the court may order a sale of the premises.³⁹ Partition is a matter of right, by the common law as well as by statute; and, where the sale as well as the actual partition of the premises held in common, will be greatly prejudicial to the owners, as compared with the use

³⁸ *Wendley v. Barrow*, 2 Jones Eq. 66; *Johnson v. Olmstead*, 49 Conn. 517; 48 N. Y. 126.

³⁹ If the commissioners, or a majority of them, report that the property, or a particular lot, tract, or other portion thereof, is so circumstanced, that a partition thereof cannot be made, without great prejudice to the owners thereof, the court, if it is satisfied that the report is just and correct, may thereupon, except as otherwise expressly prescribed in this article, modify the interlocutory judgment, or render a supplemental interlocutory judgment, reciting the facts, and directing that the property, or the distinct parcel thereof so circumstanced, be sold by a referee, designated in the judgment, or by the sheriff. N. Y. Code Civ. Pro. § 1560.

³⁹ 3 N. Y. R. S. 596, § 81.

thereof in common, an actual partition must be made; unless the injury to the interests of the owners collectively, in reference to the rights of each in common property, will be much greater by an actual partition than by a sale.⁴⁰ An order for sale of premises in partition will not be made unless the court becomes satisfied that there is a necessity for such order existing. Therefore, it is necessary that the facts and circumstances be stated upon which the opinion of the commissioners is founded.⁴¹

Partition sale should not be ordered where infants or a trustee without power of purchase are parties entitled, unless it appears that an actual partition with or without compensation cannot be made. Where there are several parcels, the impossibility of dividing one is not a reason for ordering a sale of that one. Interests of infants should be carefully scrutinized and protected.⁴² Where commissioners state in their report that the portion set off for the widow's dower is so situated as to make a valuable farm, and if divided among the heirs, the parcels that would be assigned to each, would be so small as to be of little value, and would lessen the value of the whole, the reason assigned is entirely satisfactory, and the same reason would be sufficient to authorize the court to order a sale thereof, subject to the widow's life estate.⁴³ In one case, it was ordered that the furniture of the hotel situated upon the real estate in question should be sold in one parcel with

⁴⁰ *Smith v. Smith*, 10 Paige, 470.

⁴¹ *Tucker v. Tucker*, 19 Wend. 226. See 11 How. Pr. 490; 40 Wis. 362; 45 Ind. 318; 3 Abb. N. C. 12; 21 Alb. Law J. 174; 65 Barb. 192.

⁴² *Walker v. Walker*, 3 Abb. N. C. 12.

⁴³ *Post v. Post*, 65 Barb. 192, *ante*.

the real estate. It appeared that it could be disposed of to a better advantage in that way ; the court held that it was no error.⁴⁴ The judgment is conclusive where the court has jurisdiction as to whether it should be a sale or partition.⁴⁵ The real estate may be divided, or, in some instances, it may be decreed to the petitioner at the valuation.⁴⁶

If a sale is ordered, the court has a right, and it is its duty to adjust and secure the rights of the parties in the proceeds of the sale, whether such rights are legal or equitable.⁴⁷ Where one tenant in common has made a verbal agreement with his co-tenant to sell to him his interest in the lands held in common, and after a partial or full payment refused or neglected to fulfill the contract, a court of equity in awarding partition may decree that the purchase money so paid shall be a lien upon the premises.⁴⁸ Likewise, a court may decree that the judgment shall be binding upon an infant, or that the conveyance made by an infant shall be binding upon him, unless he show cause against it within a reasonable time after arriving of age.⁴⁹ Where, in a partition suit, an actual partition cannot be made and a sale is decreed, the question as to the distribution of the proceeds of the sale of an undivided share of the premises between the owner and incumbrancers is collateral to the main purpose of

⁴⁴ *Prentice v. Janssen*, 9 N.Y. Week. Dig. 466. See 1 *Jarman on Wills*, 523 ; *Story Eq. Jur.* § 793 ; 69 N. Y. 1 ; 72 *Id.* 563 ; 41 *Id.* 289 ; 21 *Alb. L. J.* 174 ; 7 N. Y. Week. Dig. 318.

⁴⁵ *Clemens v. Clements*, 37 N. Y. 59, *ante*.

⁴⁶ *Dewar v. Spence*, 2 *Whart.* 211.

⁴⁷ *Milligan v. Poole*, 35 *Ind.* 64 ; *Gregory v. Gregory*, 69 N.C. 522.

⁴⁸ *Campbell v. Campbell*, 2 *N. J. Eq.* 268.

⁴⁹ *Jackson v. Edwards*, 7 *Paige*, 388, *ante*.

the action; the court, having jurisdiction of the fund, adjudges how distribution shall be made.⁵⁰

An infant defendant in a proceeding for the partition of real estate, who is not served with a summons notifying him of its pendency, or whose guardian does not attend and approve of the partition, he and his guardian having no actual knowledge of the proceeding until after its determination, may not have a review of the partition within one year after the removal of his disability, without showing sufficient cause. A judgment in proceeding to review a former judgment, either granting or refusing the review, puts an end to the action for a review, and is a judgment from which an appeal will lie to the Supreme Court.⁵¹

An order for sale may be made in a partition action on a motion upon admissions in the pleadings. In such an order, the court will direct an account of rents and profits received by the plaintiff, where he has been in possession, and adjourned further consideration.⁵² A tenant who has improved part of the common property is entitled to the improved part; or, if that will injure the co-tenants, to have compensation in money for such improvements.⁵³ Where one tenant in common has received rents of the property held in common, his co-tenant has a lien upon his share for the proportion of the rents belonging to such co-tenant.⁵⁴ A life tenant has a right to use mines upon the premises for his own benefit and profit, where the

⁵⁰ *Halsted v. Halsted*, 55 N. Y. 442.

⁵¹ *Brown v. Keyser*, 53 Ind. 85.

⁵² *Burnell v. Burnell*, 27 Moak Eng. 472. See *Gilbert v. Smith*, 2 Ch. D. 686; *Bennett v. Moore*, 1 Ch. D. 692.

⁵³ *Paddock v. Shields*, 57 Miss. 340.

⁵⁴ *Wright v. Wright*, 59 How. Pr. 177.

owner in fee opened such mines.⁵⁵ The Michigan statutes allow one tenant in common the benefit of improvements put upon the common property.⁵⁶ The rule is the same in Louisiana.⁵⁷ Tenants in common sustain to each other a relation of trust because of their common interest, and while one cannot act for his individual interests in hostility to the common interest, yet, if he does what is necessary to the protection of the common interest, he is entitled to charge the common property with the costs of the benefit; but one of the co-tenants in common of the estate in expectancy is not permitted by this principle, to discharge a burden on the common property in the possession of the tenant of the particular estate, except where it is necessary to prevent the destruction of the expectancy.⁵⁸

It is the right of the plaintiff, who is entitled to a moiety of the property, to have a sale instead of a partition, notwithstanding the opposition or disability of the defendant who is entitled to the other moiety, unless the defendant show reason to the contrary.⁵⁹ In one English case, the estate consisted of a mansion-house and one hundred and eighty-five acres belonging to the plaintiff and the defendant in equal moieties. It was almost surrounded by a large estate, of which the plaintiff was tenant for life, and with which it was formerly united as a

⁵⁵ Gaines *v.* Green, 33 N. J. Eq. 603; reversing 32 Id. 86.

⁵⁶ Sands *v.* Davis, 40 Mich. 14.

⁵⁷ Jackson *v.* Ladeling, 99 U. S. 513; citing 88 U. S. 492; 19 La. 414; 3 La. Ann. 203; 4 La. Ann. 519, 541; 13 Id. 494; 16 Id. 243; 26 Id. 587; 38 De Rei Vindictiōne, bk. 6, tit. 1; 6 Paige, 390; 80 U. S. 543; 4 Rid. 462; 1 Rand. 58.

⁵⁸ Harrison *v.* Harrison, 56 Miss. 174.

⁵⁹ Rowe *v.* Gray, 22 Moak Eng. 70.

part of the same family estate. In an action for partition or sale, the plaintiff desired a partition under which the mansion-house and part of the land contiguous thereto should be allotted to him, alleging that its value would be depreciated if severed from the larger estate ; he offering to pay what should be necessary for equality of partition. The defendant, who was also a neighboring land-owner, desired a sale, and had offered, on the writ being issued, to submit to an immediate decree for sale. In this case, it was held by the court, that, under section 4 of the Partition Act of England, of 1868, as "no good reason to the contrary" of a sale had been adduced, a sale must be directed.⁶⁰

Where an undivided portion of a tract of land is conveyed, and the grantor afterwards conveys to others particular parts by metes and bounds, and the grantee of the undivided portion then petitions for partition, his share of the land should be set off and assigned as not to embrace any part of the land thus conveyed by metes and bounds, if he can otherwise have a fair and equal partition.⁶¹ A partition of land, made without notice to a party who has *attached* on mesue process the interest of one of the tenants in common, is not binding upon such party, and he may therefore rightfully levy his execution as upon an estate in common.⁶²

The jurisdiction of courts of equity in matters of partition is doubted, but, in many cases, is indispensable. A bill in chancery lies for partition, notwithstanding

⁶⁰ *Porter v. Lopes*, 23 Moak Eng. 631; citing 30 Beav. 109; 33 Id. 401; 1 Peer Wms. 446.

⁶¹ *Webber v. Mallett*, 4 Shep. 88.

⁶² *Munroe v. Luke*, 19 Pick, 39.

an adverse possession, unless it has been continued to bar a recovery under the statutes of limitations.⁶⁴ An erroneous computation or inaccuracy of the commissioners may be corrected by the final judgment.⁶⁵

⁶⁴ *Howey v. Goings*, 13 Ill. 95,

⁶⁵ *Wright v. Marsh*, 2 Greene, 94.

CHAPTER XVIII.

LIENS.

THE court must, or at any rate, it should in most cases, before the entry of the interlocutory judgment, cause an order to be made, either with or without application by a party in interest, directing a reference, to ascertain whether there is any creditor, not a party to the action, who has a lien upon any part or the whole of the premises, or any person who has a lien upon any undivided interest in the premises ; and the referee so appointed shall report to the court the result of his inquiry pursuant to said order. The court may make an order dispensing with such reference, when a party to the action produces a search, certified by the clerk or by the clerk and register, as the case may be, setting forth the liens upon the property ; and where it appears by proof that there are no other liens, excepting those set forth in such search, or where such certified search shows that there are no outstanding liens against the whole, or any part of the property sought to be partitioned or sold. *

* Before an interlocutory judgment for the sale of real property is rendered, in an action for partition, the court must, either with or without application by a party, direct a reference, to ascertain whether there is any creditor, not a party, who has a lien on the undivided share* or interest of any party. But the court may direct or dispense with such reference, in its discretion,

The right of an incumbrancer cannot be affected by a sale of lands in partition; and, if the lands are divided, the lien of the incumbrance, after the division, will be confined to the share allotted to the party against whom the incumbrance is held. If the lands are sold, the purchaser will take the premises subject to the lien of the incumbrance upon the undivided share. But the Revised Statutes of New York have altered the law upon this subject, and have authorized the court to decree a sale, which shall give to the purchaser a perfect title, discharged from all liens and incumbrances.¹ The section of the Revised Statutes referred to (section 57, page 591, volume 3), provides for the payment of such incumbrancers. Where the land is to be sold, it is necessary in order to effect division among those entitled, and where there are no incumbrances upon the land and there are questions as to the extent of the liens by reason of such incumbrance, the court may, either before decree or before sale, direct that the amount of the incumbrances be ascertained.² A creditor of a deceased person, who has not a judgment lien on the land of the deceased, cannot be made a party to the suit for a partition brought for the purpose of dividing the real estate among the heirs and devisees.³ Unless the statutes and the rules of practice of the State in which the partition

where a party produces a search, certified by the clerk, or by the clerk and register, as the case requires, of the county where the property is situated; and it appears therefrom, and by the affidavits, if any produced therewith, that there is no such outstanding lien. N. Y. Code Civ. Pro. § 1561.

¹ *Harwood v. Kirby*, 1 *Paige*, 469. See 1 *Hopk.* 501.

² *Thurston v. Minke*, 32 *Md.* 574.

³ *Waring v. Waring*, 3 *Abb. Pr.* 246. See 1 *Bland*, 51. *Contra*, 14 *N. J. Eq.* 240.

action is brought direct to the contrary, an incumbrancer is not a necessary party defendant, because relief cannot be decreed as against him, and the action can in no way affect his incumbrance or change his lien, except it be a lien against an undivided portion of the premises, and in such case, after a division, it becomes a lien against that part of the premises allotted to the co-tenant against whom the judgment or lien has been perfected.⁴

In case of a sale of the property, it is evident that it is the duty of the court to do that which is necessary for the protection of the purchaser of the property. The purchaser should know what liens are upon the property, or else there should be given to him a clear title, free and clear from any or all incumbrances, and in case such a title is given to him, the court should see that the interests of the lienholders are protected as well as that of the purchaser, and that the lienholders out of the purchase-money receive compensation for their liens. It is not the business of the court to draw itself into a discussion of various conflicting rights that might be claimed by those holding incumbrances, and it is held, that the true rule was that no persons should be made parties, except those having a present interest in the premises. In one common law case decided in the New York courts, it was held, that judgment creditors and other incumbrancers were not proper parties to the bill for partition, even where a sale of the premises is decreed; and where they were made parties, in such case, by supplemental bill, it was held, that such supplemental bill should be dis-

⁴ *Low v. Holmes*, 17 N. J. Eq. 150; *Speer v. Speer*, *McCartner* Ch. 251; 1 Ves. & B. 551; 7 Johns. Ch. 141; 22 Am. Dec. 375; 81 Penn. St. 122. *Contra*, *McDongall v. McDongall*, 14 *Grant* Ch. 267.

missed.⁵ At this time the law in England was that the property should always be divided, unless a compromise should take place. No power existed there to order a sale of the premises. Undoubtedly, the decision of the chancellor above referred to was based somewhat upon the English law allowing no sale, as in the opinion, his argument seemed to be from that standpoint, and his decision is based upon the ground that the partition could in no way affect those who had or held liens upon the lands, or that they had no present interest or estate in the premises.⁶ If no means were provided by which liens could be brought to the notice of the court in such cases, a great injustice might be done to those who are purchasers of the premises, or to those who hold such incumbrances. Liens against a co-tenant's interest should be brought to the notice of the court, if not, the lands would be sold at a sacrifice owing to the fact that the title of the purchaser would be something like a lottery, he not knowing whether what he got was good for anything or not, or whether his investment would prove to him a loss or not.

The present statutes of New York contemplate that such incumbrance shall be brought to the attention of the court, and allow persons having a lien or interest which attaches to the entire property, to be made defendants in the action, and provide in section 1561 of its Code above referred to, for a reference to inquire into the facts and circumstances pertaining to liens upon the undivided portions of the property. In Pennsylvania a sale in partition is like other judicial sales in that State, and

⁵ *Sebring v. Mersereau*, 9 Cow. 344.

⁶ *Baring v. Nash*, 1 V. & B. 551; *Wotten v. Copeland*, 7 Johns. Ch. 141. See 1 *Paige*, 487; 1 *Hopk.* 501.

transfers the property to the purchaser free from all liens.⁷ But, after the sale, the lien remains upon the moneys realized from the sale.⁸ The referee, appointed by the court, will take proof in respect to the liens, and to their extend and validity, whether those liens are disclosed by the pleadings or not. Where actual partition cannot be made, and a sale is decreed, the question as to the distribution of the proceeds of the sale of any undivided share of the premises between the owner and incumbrancers is collateral to the main purpose of the action; the court, having jurisdiction of the fund, adjudges how distribution shall be made. Where, therefore, in accordance with the practice, an order of reference is granted directing the referee to ascertain and report the amount due to any party to the action who has any general or specific lien upon the premises, the referee is authorized to take proof and pass upon the validity of the mortgage upon an undivided share, claimed by one of the parties, although the question is not raised by any formal issue in the pleadings.⁹ An order for a sale of the premises may be made without a reference to the clerk to search for liens and incumbrances, unless such reference is asked for by one of the parties.¹⁰ Judgments and decrees do not cease to be a lien as against heirs at law at the end of ten years. The parties to such action who choose to omit the ordinary advertisement should produce, at their own cost, regular searches for all judgments and decrees for at least twenty years. A purchaser under a partition sale

⁷ *Gerard Life Ins. Co. v. F. & M. Bank*, 57 Penn. St. 394; 23 Id. 477; 27 Id. 473; 67 Am. Dec. 485.

⁸ *Henry v. Auld*, 8 Va. L. J. 54.

⁹ *Halsted v. Halsted*, 55 N. Y. 442.

¹⁰ *Gardner v. Luke*, 12 Wend. 269; 26 Barb. 478.

by the heirs at law is not bound to take an affidavit of the administrator or any other person, that there are no debts of the deceased ; he is entitled to have the fact made out beyond all reasonable doubt that there are no debts or liabilities of any kind of the deceased, for which there is any risk that the property may be sold, whether those debts are his own, or as surety, or contingent.¹¹

The purchaser, not a tenant in common, cannot object to the validity of the sale on the ground that he was not made a party to the proceedings—he holding a deed of the premises purchased pending the action from some one or more of the heirs, defendants in the partition suit ; and it is not necessary that the referee in such proceedings advertise for liens. Such notice is not necessary to be published unless by advice of the court, or it is required by some one or more of the parties to the suit.¹²

Where the reference is directed, as prescribed by section 1561 of the New York Code, it is the duty of the referee to cause a notice to be published, once in each week for six successive weeks, in the newspaper printed at Albany, in which legal notices are required to be published, and also in a newspaper published in each county where the property is located, requiring each and every person, not a party to the action, who has a lien upon any undivided share or interest in the property, to appear before the referee at a specified time and place, and establish his claim or lien, and the true amount due or to become due upon the same. The referee must render his report to the court, with all convenient speed, in which he reports the name of each creditor, and the extent of

¹¹ *Hall v. Partridge*, 10 How. Pr. 188. See 12 Wend. 269; 4 Paige, 481; 1 Edw. 565.

¹² *Noble v. Cromwell* 27 How. Pr. 289, *ante*. See 6 Abb. Pr. 63.

such creditor's lien, which has been satisfactorily proved before him, giving the amount due or to become due upon such lien.^b

Where notice has been given to creditors having general liens upon the undivided interest of one of the parties in a partition suit to come in and establish their claims before the master, the lien of such creditors upon the estate will be divested by the sale; a purchaser at the sale under the decree cannot therefore object that the master has decided wrong as to the extent of such a lien. If the master improperly rejects the claim of a creditor coming in under the notice in a partition suit, as to his lien upon the premises, the claimant must except to the master's report, if he wishes to preserve his lien upon the purchase money for which the premises are to be sold under the decree. The purchaser cannot object to the title merely on the ground that there is a possibility that some person, other than the parties to the suit, has an interest in the premises, where there is no probability that any such interest exists. It is an established rule, both at law and in equity, that a mortgage is not evi-

^b Where a reference is directed, as prescribed in the last section, the referee must cause a notice to be published, once in each week for six successive weeks, in the newspaper printed at Albany, in which legal notices are required to be published, and also in a newspaper published in each county wherein the property is situated, requiring each person, not a party to the action, who, at the date of the order, had a lien upon any undivided share or interest in the property, to appear before the referee, at a specified place, and on or before a specified day, to prove his lien, and the true amount due or to become due to him by reason thereof. The referee must report to the court, with all convenient speed, the name of each creditor, whose lien is satisfactorily proved before him, the nature and extent of the lien, the date thereof, and the amount due or to become due thereupon. N. Y. Code Civ. Pro. § 1562.

dence of a subsisting title or interest in the mortgagee, if he has never entered under his mortgage, and no interest has been paid thereon for more than twenty years.¹³

Where the interest of one of the defendants in the premises, in a partition suit, is sold under a judgment at law against him subsequent to the filing of the complainant's bill and the notice of the pendency of the suit for partition, the purchaser must come in before the master and prove his claim, under the order of reference as to general liens; as his interest in the premises will be divested by a sale under the decree.¹⁴ The referee in the performance of his duties should not only inquire as to the liens upon the share of each party to the action, but should in addition cause searches of the records to be made in the same manner as if he was making a careful examination of the title. These searches are generally furnished by the attorney who conducts the action on behalf of the plaintiff. The referee has a right to require that an abstract of the title shall be laid before him, and, when necessary, he should be furnished with an affidavit as to deaths, descents, intestacy, probate and record of wills, and any other matter that may be necessary to assist him in the performance of his duties pursuant to the order of reference. He should summon before him such persons as he may ascertain are creditors, and get from them their statements. His inquiries should be directed both as to persons and facts. The inquiry as to the creditors is absolutely required by the statute.¹⁵

¹³ *Dunham v. Minard*, 4 Paige, 440. See 10 Abb. N. C. 46; 5 Johns. Ch. 552.

¹⁴ *Spring v. Sandford*, 7 Paige, 550. See 11 Abb. Pr. 381; 10 How. Pr. 188; 27 Id. 389.

¹⁵ *Wilde v. Jenkins*, 4 Paige, 481; *Van Sant. Eq. Pr.* 543.

That able law writer, William Wait, upon this subject says: "Before making an order for the sale of the premises, where the creditors having specific liens shall not have been made parties, the court, upon the motion of either party, shall direct the plaintiff to amend his complaint, by making every creditor having a specific lien on the undivided estate of any of the parties, by mortgage, devise, or otherwise, a party to the proceedings. In such case the court will order a reference to the clerk or some other suitable party, to ascertain and report whether the shares or interests in the premises of the parties to the action, or any of them, are subject to a general lien or incumbrance by judgment or decree."¹⁶ The reference is not absolutely necessary, and may be omitted unless asked for by one or more of the parties to the action.¹⁷

It has been held that the advertisement required by the Code is not a necessity. If there are no general liens, it is useless to incur the expense of such advertisement. If the parties to the action know that there are no general liens and no such liens as set forth in section 1561, and produce before the court, or referee, satisfactory proof to that effect, the advertisement may be dispensed with. Then there may be a further reason for dispensing with such advertisement, and that is to avoid the delay caused by it, and the expense and delay can be avoided, seeing as the same will result in no good to those in interest.¹⁸ If such advertisement is omitted, inasmuch as judgments and decrees do not cease to be a lien against heirs at law

¹⁶ N. Y. L. 1847, ch. 280, § 77; Wait Pr. 117.

¹⁷ 12 Wend. 269; 10 How. Pr. 188; 27 Id. 289; 6 Abb. 59; 3 Abb. Ct. App. 382.

¹⁸ Hall *v.* Partridge, 10 How. Pr. 188, *ante*; Alvord *v.* Beach, 5 Abb. Pr. 451.

at the end of ten years, the parties to the action who choose to have such advertisement omitted should, at their own cost and expense, produce regular searches for all judgments and decrees for at least twenty years back.¹⁹ If it appears by the pleadings, or otherwise, that there was any existing lien upon the share or interest of a party in the property at the date of the order, the interlocutory judgment should direct that the officer making the sale and receiving the money thereon arising from such sale, shall pay into court the portion of the money, arising from the sale of the share or interest of that party, after deducting the costs and expenses for which he is liable.²⁰ When the amount of existing incumbrances shall have been ascertained, the court shall proceed to order a distribution of the moneys so brought into court as aforesaid and remaining therein, among the several creditors having incumbrances upon the property or the share and interest of the property. Such distribution to be made according to the priority of such incumbrances.²¹

Application may be made for the money so paid into court in accordance with the sections of the Revised Statutes 44 to 47 inclusive, above referred to, and payment had thereon according to the priority of the liens or incumbrances established. The applicant in making such application must produce his own affidavit, or, if there is reason for

¹⁹ 5 Wait Pr. 119.

²⁰ If it appears by the pleadings, or by the evidence in the action, or by the report, that there was, at the date of the order, any existing lien upon the share or interest of a party in the property, the interlocutory judgment, directing the sale, must also direct the officer making it to pay into court the portion of the money, arising from the share or interest of that party, after deducting the portion of the costs and expenses for which it is liable. N. Y. Code Civ. Pro. § 1563.

²¹ See sec. 44 to 47 inclusive, N. Y. R. S. p. 591, 3 vol. 6 ed.

not producing his own affidavit, then that of his agent or attorney, stating the amount actually due on each incumbrance, and the name and residence of the owner of the incumbrance, so far as known to him, or so far as he has been able to ascertain after due diligence upon his part. He shall also show by affidavit, service of a notice of the application upon each owner of an incumbrance; and the service within the State of New York must be personal, or by leaving a true order of such application at the owners' place of residence, with some person of mature age and discretion, at least fourteen days previous to the application. If service should be made outside of the State, twenty days' notice must be given. If the owner of the incumbrance resides without the State, and his true place of residence cannot be found by fair and reasonable diligence, such notice may be served upon him by publishing the same in the newspaper, or newspapers, in which such legal notices are required to be printed; and the court upon application must make such order as the justice of the case requires.⁴

The court may, of its own motion, or upon the applica-

⁴ Where money is paid into court, in a case specified in the last section, the party may apply to the court for an order directing that the money, or such part thereof as he claims, be paid to him. Upon such an application, he must produce the following papers:

1. An affidavit, made by himself, or, if a sufficient excuse is shown, by his agent or attorney, stating the true amount actually due on each incumbrance, and the name and residence of the owner of the incumbrance, as far as they are known, or can be ascertained with due diligence.

2. An affidavit, showing service of a notice of the application upon each owner of an incumbrance. Service of the notice, within the State must be personal, or by leaving it at the owner's residence, with some person of suitable age and discretion, at least fourteen days previous to the application. Service, without the

tion of either party, without the consent of the other, direct a reference to take an account, and report to the court thereon, either with or without the testimony, after interlocutory or final judgment, or where it is necessary to do so, for the information of the court; and also to determine and report upon a question of fact, arising in any stage of the action, upon a motion, or otherwise, except upon the pleadings.²¹

The court has control of the funds arising from the sale in partition until they are distributed according to its order, and the funds derived from the sale of the share or interest of such co-tenant against whose share there is an incumbrance, remain in the custody of the court after the same has been paid therein, until all questions pertaining to such liens or incumbrances shall have been fully settled, and then shall direct a distribution of such funds paying the same out upon the liens that have been established in accordance with the law and practice; paying upon the liens, according to the priority of each. Where the incumbrancer is not a party to the action, the clerk, master, commissioner, referee, or other officer, by whom the lien is paid off, must cause such lien to be duly satisfied. The expense of so doing must be paid out of

State, if personal, must be made at least twenty days previous to the application. If the owner of the incumbrance resides without the State, and the place of his abode can not be ascertained, with reasonable diligence, notice may be served upon him by publishing it in the newspaper printed at Albany, in which legal notices are required to be published, once in each week for the four weeks immediately preceding the application.

Upon the application, the court must make such an order as justice requires. N. Y. Code Civ. Pro. § 1564.

²¹ N. Y. Code Civ. Pro. § 1015; 24 How. Pr. 409; 2 Hilt. 130; 1 Hun, 41; 14 How. Pr. 443; 2 Abb. Pr. 411.

the portion of the money in court, belonging to the party by whom the incumbrance was payable.^e The final judgment is a bar against each person, not a party, who has, at the time when it is rendered, a general lien by judgment or decree on the undivided portion of any co-tenant, if notice was given to such owner of such lien to appear before the referee, and make the proof required as aforesaid.²² The proceedings to ascertain and settle the liens, as prescribed by sections 1563, 1564, 1565, shall not affect any other party to the action, or delay the paying over or investing of money, to or for the benefit of any other party, upon whose share or interest there are no existing liens.^f

If the referee, in a partition suit, make an erroneous report that the share of a party is subject to a certain judgment, the error can not be corrected, where there is

^e When the whole amount of the unsatisfied liens upon an undivided share, which were existing at the date of the order of reference, has been ascertained, the court must order the portion of the money so paid into court, on account of that share, to be distributed among the creditors having the liens, according to the priority of each of them. Where the incumbrancer is not a party to the action, the clerk, or other officer, by whom a lien is paid off, must procure satisfaction thereof to be acknowledged or proved, as required by law, and must cause the incumbrance to be duly satisfied or canceled of record. The expense of so doing must be paid out of the portion of the money in court, belonging to the party, by whom the incumbrance was payable. N. Y. Code Civ. Pro. § 1565.

²² N. Y. Code Civ. Pro. § 1578; N. Y. Laws 1830, ch. 320, § 45.

^f The proceedings to ascertain and settle the liens upon an undivided share, as prescribed in the last three sections, shall not affect any other party to the action, or delay the paying over or investing of money, to or for the benefit of any other party, upon whose share or interest in the property there does not appear to be any existing lien. N. Y. Code Civ. Pro. § 1566; 2 N. Y. R. S. ch. 325, § 49.

no exception taken to the report.²³ The report must be excepted to in due season to preserve the rights of the incumbrancers.²⁴

²³ *Scott v. Howard*, 3 Barb. 319.

²⁴ 4 *Paige*, 442, *ante*.

CHAPTER XIX.

DOWER.

THERE is no dower in cases of joint-tenancy, because there is no estate that remains in the heirs or next of kin of the deceased. When a joint-tenant dies, the title to his real estate passes immediately to his survivor or survivors, and his co-tenants, such survivors, are instantly seized of the whole estate. His heirs can claim no part of the property by reason of heirship ; the estate being defeated by survivorship prevents the wife from having any dower.¹ In some States, dower in the lands of joint-tenants is allowed by statute.² The widow has no dower from her husband, who was a joint-tenant, for the same reason that a joint-tenant cannot divest the estate held by him as such, as there is no estate after his death to operate upon, and such devise has no effect.³ The right of survivorship is as good as a right by descent ; and it was at one time considered that there was nothing unreasonable or unequal in the law of joint-tenancy, each joint-tenant having a chance to survive his fellow co-tenant : and the duration of all lives being uncertain, and

¹ *Mayburry v. Brien*, 15 Pet. 37.

² *James v. Rowan*, 6 Smedes & M. 393.

³ *Duncan v. Forrer*, 6 Binn. 197. See *Powell on Devises*, 116; *Swift v. Roberts*, Amb. 617; 1 *Blackst.* 476.

the right that either tenant had to sever the co-tenancy by conveyance; so that it was considered, that lands held to parties by survivorship was no hardship to any of the parties in interest, but in this it is doubtful whether the English courts took into consideration the fact that it might be a hardship to the widow, who could receive no dower whatever by reason of the survivorship.⁴ Wherever survivorship has been abolished by statute, the only obstacle to the wife obtaining dower has been removed. In some States those statutes exist, and where such is the case, the dower of the widow is as fully recognized as though her husband's estate had been that of a tenant in common.⁵

But where the lands are held in common, the wife has a dower in that portion held by her husband in his lifetime, and in case of a partition of the lands, her dower is confined to that portion of the land allotted to her husband. At common law, a widow entitled to dower did not have an estate in the premises until the assignment. She was not entitled to a joint possession with the heirs, and was not a tenant in common.⁶ The statutory law has changed the common-law rule, and the widow, upon the death of her husband, has a right to the possession of one-third of his real estate. That possession makes her a tenant in common with the heirs, and her right as such tenant in common, or her right of entry and possession, does not depend upon the assignment of dower, for that

⁴ *Cray v. Willis*, 2 Peere Wms. 529; *Staples v. Maurice*, 17 Bro. P. C. 49; 1 Eq. Cas. 243; 2 Id. 457, 458, 537; 3 P. Wms. 115.

⁵ *Holbrook v. Finney*, 4 Mass. 568; 9 Dana, 185; 4 Ired. Eq. Cas. 277; 3 Am. Dec. 243.

⁶ 4 Kent Comm. 62.

is a mere severance of the common estate.⁷ A tenant in common can pass his property by bequest.⁸

The husband has no power in a voluntary partition to charge the wife's dower. While the husband is a tenant in common, the wife has a dower in that which he holds in co-tenancy. As soon as a division of the land is had, even though that division is by the tenants themselves of their own property, the husband acquires a sole seizin of that part allotted to him, and the wife's dower immediately attaches to such allotment, and she has no right of dower in any of the other parts of the lands of the joint-tenancy. If the husband is a tenant in common, the dower right of the wife is not dependent upon the making of partition of the premises. That dower right exists prior to such partition. One who is in possession of real estate does not become a tenant in common thereof merely by accepting a deed from the owner of an undivided interest therein.⁹ The dower of the wife is not paramount to the rights of the co-tenants of her husband so as to compel a partition, and it does not in any respect interfere with or impair her husband's authority to make a valid partition by deed or agreement; and such partition, made valid, may not divide the whole of the property held by the tenants in common and may or may not create a new tenancy. Whenever the husband makes a voluntary partition, it is supposed that the dower interest of the wife is removed from all the other property, and it is confined only to that portion taken by her husband, as

⁷ *Crocker v. Fox*, 1 Root, 323; *Stedman v. Fortune*, 5 Conn. 462. See 2 Mo. 163; 4 Ind. 215.

⁸ 1 P. Wms. 700; 5 Ves. 744; 2 Ired. Eq. 330.

⁹ 13 Johns. 406.

his share of the co-tenancy.⁹ The husband cannot make a voluntary partition for the purpose of destroying his wife's rights and defrauding her of that which is given to her by the law, and in case the husband should attempt to make a partition to defraud his wife, the wife would not be bound by his act. Where heirs agree upon an amicable division and pass mutual and confirmatory deeds of release, it is no objection to a title against one heir and his wife that the wives of any other of the heirs did not join in a release: they would, on an assertion of right of dower, be restricted to their husband's undivided share. Nor, in such a case, where one heir was dead at the time of the partition and execution of the releases, but a share was set aside for his representatives, and his widow survived and confirmed the same, could it be considered an objection to title that she might be dowable as out of the whole descendible property as undivided.¹⁰ All persons, who may have had any claim or interest whatever in the partition suit, and who were parties to it, were bound by the decree, and could not at a later day and in another action take advantage of any irregularity relative to the widow's dower, or any other matter that was passed upon in the partition suit, as that decree, allowed to rest without any appeal, is final and binding.¹¹ If the husband, who is a co-tenant, conveys his interest in the property to other parties, and the wife does not join, though perhaps such conveyance may not be made for the purpose of defrauding the wife of her right of dower, her dower yet remains in the premises and cannot be disturbed. One

⁹ *Potter v. Wheeler*, 13 Mass. 506; *Jackson v. Edwards*, 22 Wend. 512. See 22 Mo. 203; 64 Am. Dec. 262; 3 Paige, 658.

¹⁰ *Totten v. Stuyvesant*, 3 Edw. Ch. 527. See 18 Wend. 257.

¹¹ 10 Paige, 399; 8 N. Y. 448.

reason for this is that the husband has parted with all his interest in the co-tenancy, while, where there is a voluntary partition made, the co-tenancy is divided and each co-tenant's interest therein becomes separate, he owning that interest in severalty. If the husband deeds to a third party, who is a stranger to the joint-tenancy, his wife not joining in the deed, and thereafter dies, then, if the co-tenants should partition and divide the land up among themselves, the dower of the wife would not follow that portion of the land allotted to the one to whom her husband deeded, and she could not be compelled to confine her claim to that part of the premises allotted to her husband's grantee.¹²

The question whether the widow is a tenant in common with the co-tenants of her deceased husband is a question which has been to some extent in dispute by the courts. In some cases the decisions have been that the widow is not regarded as a co-tenant.¹³ Other cases seem to hold that her right of entry to the use, rents and profits of one-third of her husband's estate makes her a co-tenant with her husband's co-tenants.¹⁴ The right of dower of the widow is not a like estate to the estate held as tenants in common by the co-tenants of her deceased husband's heirs, being an estate in which she has the right to the use, benefits and profits of one-third of that part of the co-tenancy owned by her husband in his lifetime; and, undoubtedly, in those States where an action of partition is purely possessory in its nature, she having a right of entry and of possession, which would undoubt-

¹² *Rank v. Hanna*, 6 Ind. 20. See 13 Mass. 506; 32 Me. 414.

¹³ *Freem. on Co-ten.* 108, 432.

¹⁴ See 5 Johns. 80; 8 Id. 558; 15 Id. 321; 8 Am. Dec. 231; 16 *Gratt.* 267; 32 Iowa, 401.

edly make her a co-tenant with her deceased husband's co-tenants, so far as they were co-tenants by rights of possession and no further; but not so far as they were co-tenants by reason of having a common title.

The inchoate right of dower may be subjected to either voluntary or compulsory partition. Where a person, seized of land in fee, mortgages it, and afterward marries, his widow, on his death, is entitled to dower out of the equity of redemption. Where the husband was seized of land in severalty, the widow cannot proceed under the Act for the Partition of Lands for the purpose of obtaining her dower; nor can she be a party to a partition among the heirs, devisees or grantees of her husband. Where her husband was seized as joint-tenant, or tenant in common of land, the widow, as her right of dower extends only to an undivided part, is a proper party to a partition among the several joint owners.¹⁵ Under a voluntary, as well as under a compulsory partition, where everything was done by the co-tenants for the purpose of having a proper and just division of the premises, and there being no collusion or fraud among the co-tenants, no wrong could ordinarily arise from considering the wives of the respective co-tenants as bound by the allotments and divisions made by and to their husbands, for notwithstanding such allotments, the inchoate rights of dower retained by the wives in the lands allotted to their husbands in severalty was of as much value as the rights of dower which they had in the lands, when

¹⁵ *Coles v. Coles*, 15 Johns. 319. See 6 Johns. 290; 7 Id. 278; 8 Johns. 558; 7 Cow. 78; 1 Wend. 437; 5 Id. 616; 14 Id. 66; 3 Den. 219; 5 Johns. Ch. 456; 7 Paige, 411; 10 Id. 54; 2 Barb. Ch. 202; 42 How. Pr. 36; 2 Bos. 529; 2 N. Y. Leg. Obs. 408; 35 Cal. 594; 36 Id. 41.

held by their husbands in co-tenancy. Neither the husband, nor the courts, nor any other human power, can compel the wife to relinquish her right of dower, inchoate though it may be, when she is not asking the aid of the court.¹⁶

In some States, the courts have been disposed to treat the sale of the land in partition actions as conveying title paramount to the wife's right of dower.¹⁷ The right of dower in the wife subsists by virtue of the seizin of the husband ; and this right of dower is subject to any incumbrance, infirmity, or incident, which the law attaches to that seizin of the husband either at the time of the marriage, or at the time the husband became seized of the property. A liability of the property being sold by partition, is an incident which is affixed by law, and is one of the matters always to be found where there is co-tenancy ; and the inchoate right of dower of the wife is subject to the partition suit ; and its result, when the law steps in and divests the husband of his seizin, and turns the real property into personal property, the wife, by the act and policy of the law, has set apart to her a distributive share, or an interest in such personal property as will necessarily protect her in her right of dower : and that right ceases to be affixed to the land of which her husband was seized, and remains with the proceeds of the sale of that land, and under the protection of the court. The wife should be made a party to the action in order to divest the land of her inchoate right of dower, and that such right may receive the protection that is guaranteed to it by the law.¹⁸

¹⁶ *Royston v. Royston*, 21 Geo. 172; 7 Paige Ch. 391.

¹⁷ *Lee v. Lindell*, 22 Mo. 202. See 10 Md. 39; 64 Am. Dec. 262; 6 Ohio St. 547; 67 Am. Dec. 355.

¹⁸ *Greiner v. Klein*, 32 Mich. 17.

The widow's right of dower is generally regarded as paramount to the right of the heirs to compel partition ; and she cannot be divested of her dower, except by her own voluntary act.¹⁹ The right of dower may be extinct upon the sales of the lands, so far as to relieve the land from it, leaving the right of dower in the proceeds or moneys derived from such sale ; but the actual partition of the premises can in no way affect the right of dower of the widow of the common ancestor.²⁰ A married woman, who is a tenant in common of real estate, may be made a party to an action of partition, and her husband need not be joined with her, as his right, if any, as tenant by courtesy, depends upon him surviving her and upon her being seized of the property at his death. His interest, as tenant by courtesy, is in no way similar to right of dower, as the sale of the premises, during the life-time of the wife, whether it be by partition or by her voluntarily, or sold in payment of her debts, divests the land of any claim or interest that the husband might have against it by reason of being a tenant by the courtesy.²¹ The widow's right of dower should be assigned to her, and a division made of the residue of the moneys.²² The widow's dower cannot be assigned to one of the heirs in exclusion of the rest ; and a decree to that effect of forty years' standing was held to be void, and the land yet subject to partition.²³

In all cases of sales under judgment or decree of parti-

¹⁹ *Verry v. Robinson*, 25 Ind. 19; *Francisco v. Gates*, 28 Ill. 67; *Tanner v. Niles*, 1 Barb. 562.

²⁰ *Gordon v. Sterling*, 13 How. Pr. 405; 1 Barb. 560; 44 Id. 372.

²¹ *Freem. on Co-ten.* 477; *Pillsbury v. Dugan*, 9 Ohio, 120; 34 Am. Dec. 427; 8 Ohio, 106.

²² *Curtis v. Snead*, 12 Gratt. 264.

²³ *Sumner v. Parker*, 7 Mass. 79.

tion, when it shall appear that any married woman has an inchoate right in the lands divided or sold, or that any person has any contingent or vested estate in such lands, it is the duty of the court, under whose judgment or decree the sale of the land is made, to ascertain and settle the value of such inchoate, contingent or vested right or estate, according to the principles applying to annuities and survivorships, and to direct such proportion of the proceeds of the sale to be invested, secured or paid over, in such a manner as will be decreed best and proper to secure and protect the rights and interests of such parties, having such inchoate right of dower, vested or contingent future estate in the lands sought to be sold or partitioned.²⁴ The inchoate rights of dower of *femes covert*, whether infants or adults, in the undivided shares of their husbands in the land, the wives being parties to the proceedings, will be divested by a sale under the judgment or decree of the court, so as to protect the purchaser against the dower of such *feme covert*, should they survive their husbands.²⁵ When the land of the husband is sold at judicial sale, upon a judgment against the husband only, the wife, there being no redemption from the sale, becomes vested with a fee in one-third of the premises formerly owned by her husband. This is according to the statutes of Indiana by an act passed in 1875.²⁶ In Indiana, where the wife joins her husband in

²⁴ N. Y. Laws 1840, ch. 177; Post *v.* Post, 65 Barb. 192, *ante*.

²⁵ Jackson *v.* Edwards, 7 Paige, 386, *ante*. See 53 N. Y. 298, wherein reference is made, in the case of Jackson *v.* Edwards, the rule to compute the present worth of an inchoate or contingent right is discussed. See 11 How. 176.

²⁶ Medsker *v.* Parker, 70 Ind. 509. See 79 Id. 568; 80 Id. 285; 83 Id. 4; 88 Id. 227; 89 Id. 440; 92 Id. 180. Where the debt is for the purchase-money, see 101 Mass. 426; 5 Cal. 455.

executing a mortgage, the waiver is only in favor of the mortgagee, and other creditors cannot avail themselves of it.²⁷ It is, undoubtedly, a general rule at law that the waiver of the wife, who joins her husband in executing a mortgage upon the lands, only extends to the person receiving such mortgage, or to his heirs, or assigns, and other creditors could take advantage of it only so far as the interest of her husband and the wife was covered by the mortgage in which she joined ; but that, as to that interest, the waiver of the wife, during the existence of the mortgage, is for the benefit, not only of the mortgagee, but of the person who purchased the premises upon a judicial sale by virtue of the foreclosure of such mortgage ; and to that class of persons it extends to all, whether the mortgage covers a dower interest that has been waived or rests upon the estate held by the husband in severalty, or in his share or portion of a tenancy in common. By the common law, the wife was not entitled to dower out of an estate in remainder, expectant on the estate freehold ; but this strict rule is not applicable under the statutes now in force. In Indiana, in abolishing dower, and substituting an estate in fee simple, the policy of the legislature in that State was to make a more liberal provision for the wife.²⁸ The title of the co-tenants cannot be severed by proceedings in partition, except upon equitable terms. All of the equities, which in law are presented in such cases, and which arise under an agreement, must be adjusted among those equities as anything which may create a lien, or an estate

²⁷ *Perry v. Borton*, 25 Ind. 274; *McArthur v. Martin*, 23 Minn. 74; *Hunsucker v. Smith*, 49 Ind. 114.

²⁸ *Foltz v. Wert*, 1 Western R. 852; 5 R. I. 104; 1 Washb. Real Prop. 195.

in the whole, or any party of the premises. The rights of one co-tenant cannot be impaired by liens acquired against that part of the premises of another co-tenant.²⁹ This rule being general, the dower interest of any widow in the premises, or the inchoate right of dower of any wife of a co-tenant, must be equitably adjusted in the partition proceedings. An agreement in writing, between a widow and all the legatees and devisees interested in the estate, that the widow should decline to take under the will, and should release all claim to dower, thirds, etc., and that the executors should pay to her, in consideration thereof, a specified sum ; the executors having made payment to her accordingly ; such payment was binding upon the legatees and devisees, and the widow had a right to thus release her dower, and the amount paid by the executors should be allowed him upon the final settlement before the probate or orphans' court.³⁰ In this case, the widow does not take at law. She simply releases all her claims, both at law and under the will, for a special sum of money payable out of no person's particular share, but out of the general residue.³¹ Such settlement upon the part of the widow is binding upon the co-tenants of the common property, and their heirs, and assigns.

There is no way in which the value of the widow's share can be first set off to her without making her a party to the petition. It is in the discretion of the court, on her application, to allow her to obtain a partition, and for the court to determine whether a case is shown for

²⁹ 44 Ind. 156; 86 Id. 591; 3 Pom. Eq. § 1239; 98 Pa. St. 489; 3 Head, 56; 72 Ind. 562; 101 Id. 514.

³⁰ Stewart's App., 1 C. R. 577.

³¹ Sandoe's App., 15 P. F. S. 314; Callagher's App., 6 Norr. 200.

the sale of the land. The petitioner is, therefore, entitled to maintain the petition against the widow, as well as against the other respondents.³² The life estate is in the nature of an estate in dower unassigned, which, while not a bar to partition among reversioners, is not subject to partition with them.³³ A petitioner holding an undivided half of the premises, could maintain an action against the widow for partition.³⁴ Where the incumbrance upon the land consists of a right of dower, the release of which cannot be procured, the purchaser is entitled to a conveyance, if he elects to receive it, and to a deduction from the purchase money of the value of the right of dower at the time of the conveyance.³⁵ The court can decree that the widow release her right of dower when she has previously entered into a contract with the executors or co-tenants to sell the premises in question.³⁶ A widow who purchases land of which her intestate husband dies seized, at a commissioner's sale, under proceedings instituted for partition, takes the land by purchase and not by descent; and a voluntary conveyance by such widow to a second husband vests the title to the land, upon his death intestate, in his heirs, and not in those of the first husband.³⁷

Where one has an existing right of dower in the entire property which is to be sold by virtue of the decree of the court, the court must consider and determine whether the interests of all the parties require that the right of

³² *Allen v. Libbey*, 1 N. Eng. 73.

³³ *Motley v. Blake*, 12 Mass. 280; *Ward v. Gardner*, 112 Id. 42.

³⁴ *Taylor v. Blake*, 109 Mass. 513; 121 Id. 267; 9 Allen, 260.

³⁵ *Davis v. Parker*, 14 Allen, 94. See 4 Allen, 259.

³⁶ *Bostwick v. Beach*, 5 Cent. R. 388.

³⁷ *Spencer v. McGonagle*, 8 Northeastern R. 266.

dower should be excepted from the sale, or that it should be sold therewith.³⁷ In a partition suit, where the present value of a contingent or inchoate right of dower of a married woman is ascertained under a decree, pursuant to the New York statute of April 28, 1840, such value represents the present worth of the woman's right of dower in the premises, and the sum paid or reserved in respect to the same, is her absolute property. A sale under a decree in partition, operating as a statutory conversion, the sum payable to a married woman for the value of her contingent dower, is personal property, which belongs to her husband, subject to her claim for a settlement, and, on her death without asserting such claim, it will be paid over to him.³⁸ Formerly, in actions for partition, the ordinary practice, when a release could not be obtained from the wife, was, to pay the money, set apart for her dower, into court. But by the New York acts of 1848 and 1849 such persons were, in effect, declared, in respect of property and its management, to stand precisely upon the same footing as single females, and with the same power of disposal as if they were unmarried. Therefore, money awarded to the wife on partition, need not be paid into court. It would seem to be the duty of the courts to reverse the former common-law presumption, and to assume that every married woman is competent to manage and control as any man

³⁷ Where a party has an existing right of dower in the entire property directed to be sold, at the time when an interlocutory judgment for a sale is rendered in an action for partition, the court must consider and determine whether the interests of all the parties require that the right of dower should be excepted from the sale, or that it should be sold. N. Y. Code Civ. Pro. § 1567.

³⁸ *Bartlett v. Janeway*, 4 Sand. Ch. 423.

or single female.³⁹ The right of dower should be considered at the time of the rendering of the interlocutory judgment.⁴⁰

The right of dower passes, if the sale of the property, including the right of dower, is directed; and the purchaser shall hold the property free and discharged from any claim, by reason of such right of dower. The dowress, in such case, is entitled to receive, from the proceeds of the sale of the whole property, a gross sum, in satisfaction and in lieu of her right of dower, or else to have one-third of the proceeds of such sale paid into court, for the purpose of having the same invested for her benefit.^b A judgment in partition, and a sale thereunder, bars the inchoate right of dower of the wife of any owner, if she be made a party to the action. The omission to provide in the judgment for ascertaining the value of the inchoate right of dower of the one entitled thereto, is erroneous, yet it can only be corrected on appeal; the omission does not avoid the judgment, and the purchaser at a sale thereunder acquires a good and sufficient title of the premises, free from all claim of dower.⁴¹ The action in partition is an equity suit, and it has been held that,

³⁹ Benedict *v.* Seymour, 11 How. Pr. 176.

⁴⁰ 15 N. Y. 624; 9 Cow. 530; 5 Abb. Pr. 53.

^b If a sale of the property, including the right of dower, is directed, the interest of the party entitled to the right of dower shall pass thereby; and the purchaser, his heirs and assigns, shall hold the property free and discharged from any claim by virtue of that right. In that case the dowress is entitled to receive, from the proceeds of the sale of the whole property, a gross sum, in satisfaction of her right of dower, or to have one-third of those proceeds paid into court, for the purpose of being invested for her benefit, as prescribed in the next section, with respect to the dowress of an undivided share. N. Code Civ. Pro. § 1568.

⁴¹ Jordan *v.* Van Epps, 19 Hun, 526, *ante*.

inasmuch as the action in partition is an equity suit, conflicting claims in regard to dower cannot be settled in such an action.

Courts of chancery have concurrent jurisdiction with courts of law for the recovery or assignment of dower. If the right of the widow to dower is undisputed by the pleadings, the court will at once proceed to assign to her such right of dower, and to take an account of the arrears, if it is a case in which she could recover damages at law. But if her right is disputed in a court of chancery, the court will retain the bill before it, and direct a suit at law to ascertain the title to the dowry.⁴² In this case just cited, the bill was filed to recover dower, and contained a prayer for an assignment of the same and general relief. The defendants demurred to the bill for want of equity, alleging in the demurrer that the complainant had a full and complete remedy at law, and the court held as above stated, and the action at issue was as to the title of the dowry. In our present form of action, being an action possessory in its nature, and affecting the title to the premises, the court would undoubtedly allow disputed questions pertaining to dower to be settled in one and the same action, the object being to avoid a multiplicity of litigation. And courts of law having concurrent jurisdiction to decide questions of equity, such as were brought before the Court of Chancery in its day, and courts of law assuming to decide questions of law or questions of fact arising in equity under our present forms of practice, and the Court of Appeals, in passing upon the case of *Jordan against Van Epps*,⁴³ passed upon the question of dower, and Justice

⁴² *Badgley v. Bruce*, 4 Paige, 98.

⁴³ 85 N. Y. 427.

MILLER, in his opinion, states : " That the decree first entered made an improper provision for the plaintiff's dower interest, and that, upon its being opened and a new decree made, the referee found that Christopher Jordan, before the commencement of the partition suit, procured an absolute divorce from the plaintiff, and that the second decree made no provision whatever as to the plaintiff's right of dower, were matters to be considered in that case, as the plaintiff could have answered, appealed from the judgment, or moved to set it aside; and if erroneous, had her rights protected. She could have then set up her adverse possession or claim, insisting that her rights should be determined at law, and not in equity ; and, having failed to do this, or to make any defense, has no right to claim, in another action, that she was unlawfully deprived of her dower right.

While these cases sustain the general principle that a prior incumbrancer, or one who claims adversely, is not a proper party to a foreclosure suit, or in actions of kindred character, involving a question as to priority of liens or a claim to dower, adverse to the interest of the plaintiff, none of them hold, where the claim is stated in the complaint, as was the fact in the partition case, that it may not be the subject of adjudication, and the judgment thereon conclusive where no objection is taken that it is not a proper subject of consideration." Justice Miller in his opinion reviews a number of cases that have been passed upon by the courts, where somewhat different views were held.^o By the common-law rule, dower may be admeasured, notwithstanding a partition suit has been

^o 85 N. Y. 428 ; distinguished, 4 Paige, 98 ; 3 Id. 342 ; 2 Barb. Ch. 398 ; 5 Barb. 51 ; 46 N. Y. 182 ; 5 Denio, 385. See 4 Kent, 7 ed. 73, 381.

brought and the widow made a party.⁴⁴ The inchoate right of dower will be protected.⁴⁵ Where the husband and wife joined in a conveyance of land of the former, the sale being induced by fraud on the part of the grantee, the wife has a cause of action against him for damages sustained in the loss of her inchoate right of dower. The inchoate right of dower of the wife is as much entitled to protection as the vested right of a widow.⁴⁶

The right of dower is similar in its position to that of a prior incumbrance on the foreclosure of a subsequent mortgage, in the fact, that the right of dower cannot be affected so as to compel the owner thereof to be a loser by reason of the action. Some cases go so far as to hold that a sale of the property would in no way affect the right of dower. A sale of the property would, perhaps, affect the right of dower, if that sale were under a decree of partition, and the question of dower had been before the court and settled by the court in its decree; but it could not prejudice the right of dower, as that must necessarily be protected, and, in case of a sale under the decree of the court, where the question of right of dower has been settled, the dower would cease to be a lien upon the land, and would remain a lien upon the moneys derived as a result from such sale; and the purchaser would receive his title to the premises free and clear from any right of dower, and yet the right of dower would be unprejudiced and be protected.⁴⁷ The purchaser

⁴⁴ 44 Barb. 370; *Youngs v. Carter*, 10 Hun, 194.

⁴⁵ *Simar v. Canaday*, 53 N. Y. 298.

⁴⁶ *Matthews v. Duryee*, 4 Keyes, 525; *Mills v. Van Voorhies*, 20 N. Y. 412.

⁴⁷ *Eagle Fire Ins. Co. v. Lent*, 6 Paige, 635; *Holcomb v. Holcomb*, 2 Barb. 20; *Corning v. Smith*, 6 N. Y. 82. See 9 N. Y. 502; 30 Id. 428; 49 Id. 111; 75 Id. 127; 4 Hun, 359; 72 N. Y. 218; 7 Ill. 269; 79 N. Y. 634; 84 Penn. St. 537; 31 Ind. 376.

on a partition sale, under the order of the court, is entitled to be protected even against an error.⁴⁸

The party having the right of dower, or a tenant for life, or for years, in an undivided share of the property in question, is entitled to receive, from the proceeds of the sale of the property, a gross sum, to be fixed in accordance with the rules and principles applicable to annuities, such sum, when received, is in satisfaction of such person's estate or interest in the property. The written consent of the party receiving such sum must be had, the same must be acknowledged or proved, and certified to, in like manner as a deed or mortgage to be recorded. This written consent must be filed, at the time of, or before, the filing of the report of sale; otherwise, the court whose duty it is to protect the right of dower, life estate or estate for years, and especially the right of dower, must direct that, out of the proceeds of the sale, which belonged to the undivided share to which the estate or interest attaches, one-third, in case of a dowress, and, in any other case arising under section 1569 of the New Code of Civil Procedure, the entire proceeds, or such a proportion thereof as fairly represents the interest of the holder of the particular estate, must be paid into court, for the purpose of being invested for the benefit of the person so owning such dower interest or estate. ^d

⁴⁸ Holden *v.* Sackett, 12 Abb. Pr. 473; Wadhams *v.* Gray, 73 Ill. 422; Harris *v.* Jay, 55 N. Y. 421; Dorsey *v.* Thompson, 37 Md. 26. See 6 N. Y. Week. Dig. 313; Woods *v.* Lee, 21 La. Ann. 505; McCahill *v.* Eq. Co., 26 N. J. Eq. 531; Yaple *v.* Titus, *v.* Titus, 41 Penn. St. 195; 3 Barb. Ch. 241; 5 Sandf. 135; 1 Greenl. Ev. 189.

^d A party to an action for partition, who has a right of dower or is a tenant for life, or for years, in or of an undivided share of the property sold, is entitled to receive, from the proceeds of the sale, a gross sum, to be fixed according to the principles of law applicable to annuities, in satisfaction of his or her estate or in-

In an action, by a widow to recover her dower, in which infant defendants interpose the usual answer, submitting their rights to the court, proof of service of the papers, and of the failure of the adult defendants to answer, is insufficient to sustain a judgment; and a purchaser at a sale under such judgment is not bound to complete his purchase. It is only in an action for the recovery of money only, that judgment upon a verified complaint may be ordered without proof of its allegations.⁴⁹

Where one of the parties is a widow and entitled to dower in a part of the premises, and also to the use and occupation of such part until her youngest child becomes of age, the value of such interest in money can be ascertained and paid to her, if she consents to release her dower and accept a sum in gross, and her interests can thus be extinguished.⁵⁰ Although a trustee takes an estate in real property only commensurate with the purposes of the trust, while the trust continues, it seems that he has a greater estate than that of a tenant for life. If the decree in an action for the partition and sale of real property recognizes and protects remainders there-

terest. The written consent of the party to receive such a gross sum acknowledged or proved, and certified, in like manner as a deed to be recorded, must be filed, at the time of, or before, the filing of the report of sale; otherwise, the court must direct that, out of the proceeds of the sale, which belonged to the undivided share to which the estate or interest attaches, one-third, in case of a dowress, and in any other case arising under this section, the entire proceeds, or such a proportion thereof as fairly represents the interest of the holder of the particular estate, be paid into court, for the purpose of being invested for his or her benefit. N. Y. Code Civ. Pro. § 1569.

⁴⁹ *Dwyer v. Dwyer*, 13 Abb. Pr. N. S. 269. See Rule 76 N. Y. Pr. and N. Y. Code Civ. Pro. § 1579; *Benedict v. Seymour*, 11 How. 176, *ante*.

⁵⁰ *Bond v. McNiff*, 38 N. Y. Super. Ct. 83.

in, the interests of the remaindermen are cut off, even if the court erred in the practice as to the manner of protecting such remainders. Such errors would only be an irregularity and would not affect the validity of the decree.⁵¹ If the widow claiming the right of dower, or the wife having the inchoate right of dower, be an infant, a guardian must be appointed for her for the purpose of the action, and such guardian must give a bond required by the rules and practice of the court.⁵²

The court may fix the value of the inchoate right of dower, or any other future right or estate, vested or contingent, in any of the property.⁵³ Whether the inchoate right of dower of the wife of a tenant in common of lands ordered to be sold in partition suit, is affected under the provisions of our statute by a sale in pursuance of such order, so as to bar recovery in an action of dower upon death of her husband, was at one time an undecided question, and has lately been much discussed in our courts.⁵⁴

A married woman may release to her husband her

⁵¹ *Rockwell v. Decker*, 5 Civ. Pro. R. 62; distinguishing 80 N. Y. 320; citing 17 N. Y. 491; 65 Barb. 583. See 21 Alb. L. J. 435; 70 N. Y. 138, 517.

⁵² As to the validity of objection to the guardian's bond, see 18 N. Y. Week. Dig. 314; 5 Civ. Pro. R. 43.

⁵³ Where it appears, that a party to the action has an inchoate right of dower, or any other future right or estate, vested or contingent, in any other property sold, the court must fix the proportional value of the right or estate, according to the principles of law applicable to annuities and survivorships, and must direct that proportion of the proceeds of the sale to be invested, secured or paid over, in such a manner as it deems best calculated to protect the rights and interests of the parties. N. Y. Code Civ. Pro. § 1570.

⁵⁴ *Jackson v. Edwards*, 22 Wend 498, *ante*; 7 Paige, 386; 55 N. Y. 15; 3 Edw. 431; 63 N. Y. 272; 5 Abb. Pr. 101; Hoffm. 468; 2 N. Y. 251; 53 Id. 304; 13 Am. R. 526; 11 Hun, 410; 1 Sandf. 549; 28 Mich. 23; 10 Barb. 556.

inchoate right of dower, in the property directed to be sold by the decree in partition. Such release must be in writing, duly acknowledged by her and subject to the same rules in regard to such acknowledgment as a deed or other writing for record ; and such written release of her inchoate right of dower must be filed with the clerk. Thereupon, the share, or the amount received upon the sale, and being derived from her contingent interest in the lands, must be paid to her husband.⁵³

The widow is entitled to dower in the equitable estates of her husband.⁵⁴ She has a right of dower in the equity of redemption subject to a mortgage, although she may have joined in the mortgage.⁵⁵ The court will protect the right of the widow in her right of dower in and to the equity of redemption.⁵⁶ To entitle a widow to dower she must show that her husband had during the coverture an actual corporeal seizin of the premises of which dower is demanded, or that her husband had a right to such seizin, and that her husband's possession was evidence of that right unless the tenant show a paramount title in himself.⁵⁷ Her right to dower in an equity of redemption, is against all persons except the mortgagee and persons claiming under him.⁵⁸ Every devise which a husband

⁵³ A married woman may release to her husband her inchoate right of dower, in the property directed to be sold, by a written instrument, duly acknowledged by her and certified, as required by law with respect to the acknowledgment or a conveyance to bar her dower ; which must be filed with the clerk. Thereupon, the share of the proceeds of the sale, arising from her contingent interest, must be paid to her husband. N. Y. Code Civ. Pro. § 1571.

⁵⁴ *Lewis v. James*, 8 Humph. 537; *Manning v. Laboree*, 33 Me. 343.

⁵⁵ *Simotan v. Gray*, 34 Me. 50.

⁵⁶ *Hinchman v. Stiles*, 1 Stockt. 361, 454.

⁵⁷ *Mann v. Edson*, 39 Me. 25.

⁵⁸ *Hastings v. Stevens*, 9 Foster, 564.

makes of land upon which his wife's right of dower attaches, is presumed to be made subject to that right of dower, unless the contrary appears on the face of the devise, in express words, or by the strongest kind of implication.⁵⁸ It is only when the husband dies seized of land, that the widow is entitled to one-third of the rents, issues and profits thereof, prior to the assignment of dower.⁵⁹ The widow is not dowable of an imperfect equity.⁶⁰ She is entitled to dower in a right in equity of redemption of lands mortgaged, against all persons, except mortgagees and those claiming under them; against whom she cannot be endowed except by full payment of the mortgage.⁶¹ Where tenants in common make a division of the land, in equal proportions, by mutual releases, the right of dower which may accrue to the widow of either of them is limited to the part which was released to her husband. There is no such limitation to her right, though, if for a valuable consideration, the division was purposely made in unequal proportions.⁶² The widow is not entitled to dower in lands, conveyed away by her husband before marriage, although such conveyance was fraudulent, and for the purpose of defeating his creditors.⁶³

Where three persons are seized of land as tenants in common, and make a partition of land between them, by parol; and one dies seized, leaving a widow, five or six years after such partition, the lapse of time and posses-

⁵⁸ Cunningham *v.* Shannon, 4 Rich. Eq. 135.

⁵⁹ Bolster *v.* Cushman, 34 Me. 428.

⁶⁰ Edmonson *v.* Montague, 14 Ala. 370. See 15 Ala. 810; 1 Carter, 134; 1 Mann. 1.

⁶¹ Rossiter *v.* Cossit, 15 N. H. 38.

⁶² Mosher *v.* Mosher, 32 Me. 412.

⁶³ Whithed *v.* Mallory, 4 Cush. 138.

sion of land in severalty, in addition to such five or six years, sufficient, therewith, to bind the owners, is not enough to bar the rights of such widow; but she has dower in all the parcels, or one-ninth of the whole land.⁶⁴ The wife of a tenant in common is not dowable of land, not assigned, upon partition by the court, to her husband; whether she has been a party to the proceeding or not.⁶⁵ The widow is entitled to dower, although she may have lived away from her husband many years in adultery, if she has not been divorced.⁶⁶ A woman married and domiciled away from her husband, is entitled to dower in personal and real estate situated in Mississippi.⁶⁷ An alien widow is not entitled to dower, in New York.⁶⁸ To entitle a widow to dower, her husband must have had an actual corporeal seizin, or an absolute right to such seizin. A legal seizin of a vested remainder is not sufficient.⁶⁹ She must establish the seizin of her husband, either actual or constructive, at some period during the converture, before her dower can be allotted to her.⁷⁰ Dower is a legal right. The principles are the same whether it be claimed by suit at law or in equity.⁷¹

⁶⁴ *Lloyd v. Conover*, 1 Dutch. 47.

⁶⁵ *Lee v. Lindell*, 22 Miss. (1 Jones) 202.

⁶⁶ *Reynolds v. Reynolds*, 24 Wend. 193; citing Co. Litt. 32; 2 Blacks. Comm. 130; 4 Kent Comm. 52; 1 Greenl. 294; 6 Bing. 135; 9 Henry III. ch. 7; 17 Wend. 128; 8 Id. 661; 6 Paige, 332; 2. See 3 Hill, 99; 64 N. Y. 49; 11 Hun, 224; 4 Barb. 201; 24 How. Pr. 93; 3 Abb. Pr. 165; 111 U. S. 525.

⁶⁷ *Duncan v. Dick, Walker*, 281.

⁶⁸ *Connolly v. Smith*, 21 Wend. 59; citing 10 Id. 379; 1 Cow. 89; 16 Id. 615. See 3 Den. 231; 51 Wis. 256; 20 Wend. 338.

⁶⁹ *Blood v. Blood*, 23 Pick. 80; *Bullard v. Bowers*, 10 N. H. 500.

⁷⁰ *Ware v. Washington*, 6 Smedes & M. 737.

⁷¹ *Mayburry v. Brien*, 15 Pet. 21.

Where the husband had previous to his death simply a reversion in fee or a vested remainder, expectant upon an estate for life, his widow cannot be endowed. This rule applies equally as well where the estate comes to the husband by inheritance as by purchase.⁷² A purchase money mortgage cannot affect the widow's right to dower in the equity of redemption under the Revised Statutes of New York ;⁷³ and the wife is entitled to a dower in the surplus moneys on a foreclosure sale, whether the mortgage cover the whole of the premises or only that portion owned by her husband as a tenant in common.⁷⁴ The dower always extends to lands of which her husband dies seized as tenant in common with others,⁷⁵ and in his partnership lands ;⁷⁶ but it does not extend to an estate for the life of another,⁷⁷ nor in a vested remainder in fee belonging to her husband limited on the precedent life estate.⁷⁸ At common law the widow was not dowerable in her husband's equity of redemption.⁷⁹^h At common law the right of dower could not be waived or released by an agreement in lieu of dower made previous to marriage.⁸⁰

⁷² *Durando v. Durando*, 23 N. Y. 331 ; 32 Barb. 259.

⁷³ *Mills v. Van Voorhies*, 20 N. Y. 412 ; 10 Abb. Pr. 452. See 23 Barb. 435 ; 1 Edw. 279.

⁷⁴ *De Lisle v. Herbs*, 25 Hun, 485. See 48 Barb. 570 ; *Gibson v. Crehore*, 3 Pick. 475 ; *Eaton v. Simpson*, 14 Pick. 98 ; *Fish v. Fish*, 1 Conn. 559.

⁷⁵ *Smith v. Smith*, 5 Alb. L. J. 124.

⁷⁶ *Smith v. Jackson*, 2 Edw. 28.

⁷⁷ *Gillis v. Brown*, 5 Cow. 388.

⁷⁸ *Green v. Putnam*, 1 Barb. 500 ; 23 Pick. 80 ; 7 Mass. 253 ; 5 N. H. 240.

⁷⁹ *Stelle v. Carroll*, 12 Pet. 201. See 3 Mas. 459 ; 6 McLean, 422.

^h When the widow is entitled to dower in lands of which the ancestor's widow was endowed. See *Aikman v. Harsell*, 63 How. Pr. 110 ; *Leavitt v. Humphrey*, 13 Pick. 382.

⁸⁰ *Gould v. Womack*, 2 Ala. 83.

The wife's dower attaches as soon as there is a concurrence of marriage and seizin.⁸¹

The widow is entitled, in equity, to an account for rents and profits, until her dower is assigned, or to interest, if a sum of money is assessed in lieu of dower. The contrary rule is founded upon the inadequacy of the proceeding at law for the recovery of damages, and not on the want of title to the mesne profits. The right to recovery accrues upon the death of the husband.⁸² Equity will interpose against the wife's claim of dower, only in the following cases: first, where the implication that she shall not have both the devise and the dower is strong and necessary; second, where the devise is entirely inconsistent with the claim of dower; third, where it would prevent the whole will from taking effect; that is, where the claim of dower would overturn the whole *in toto*.⁸³

In proceedings in partition a recognizance or mortgage given for the widow's dower is but collateral; the lien is independent of such security, being created by law itself.⁸⁴ A written contract of marriage entered into between two parties, in the presence of witnesses, constitutes a valid marriage, and confers upon the wife the right to dower; the fact that the previous relations of the parties were unlawful is immaterial.⁸⁵

The possession of the widow is the possession of the heir. She holds of him in contemplation of law.⁸⁶

⁸¹ Scott *v.* Howard, 3 Barb. 319.

⁸² Richard *v.* Talbird, 1 Rice Eq. 158.

⁸³ Kennedy *v.* Nedrow, 2 Dall. 418; Hamilton *v.* Buckwalter, 2 Yeates, 389; McCullough *v.* Allen, 3 Id. 10; Creacraft *v.* Wions, Addison, 351.

⁸⁴ In re Null, 2 F. R. 71.

⁸⁵ Mathewson *v.* Phoenix Iron Foundry, 20 F. R. 281.

⁸⁶ Berrien *v.* Conover, 1 Harrison, 109.

This is laid down in the opinion of Justice Ryerson in the case just cited. In discussing the rights of widows, and the rights of heirs, as being that law which, when properly construed, is equity to the dowress, and equity to her children, heirs of her husband, and tenants in common of the estate, of which she is in possession, the widow has a right by the statute to hold and enjoy the mansion-house of her husband, and the messuage or plantation thereto belonging, until dower be assigned. And the estate thus given to her is not a common-law quarantine for forty days, but a freehold for her life, unless the same should be sooner defeated by an act of the heirs.⁸⁷ Dower is not in the nature of a life estate in all things, and is not affected the same way by partition.⁸⁸

To the consummation of dower, three things are necessary: marriage, seizin, and death of the husband; yet it is an interest which attaches to the lands as soon as there is a concurrence of marriage and seizin.⁸⁹ Inchoate dower is an estate and possesses the element of property. This property the wife can protect in a court of equity.⁹⁰ It is a common-law and not a statutory right.⁹¹ Inchoate dower differs from dower absolute, in that the former is a right to become fixed in future, while the latter is a right to become fixed in the present. Both are liens and charges upon the land, inalienable save by the wife or widow.⁹² The rights of dower will be protected in judicial

⁸⁷ Ackerman *v.* Shelp, 3 Halst. 125.

⁸⁸ Motley *v.* Blake, 12 Mass. 280; Ward *v.* Gardner, 112 Mass. 42, *ante*.

⁸⁹ Sisk *v.* Smith, 6 Ill. 507; Ketchum *v.* Shaw, 28 Ohio St. 506.

⁹⁰ Buzick *v.* Buzick, 44 Iowa, 259. See 55 Iowa, 256; 27 Id. 197.

⁹¹ 6 Ill. 512, *ante*.

⁹² Farewell *v.* Johnston, 34 Mich. 342; 41 Id. 702; 51 Id. 309.

proceedings.⁹³ The wife can maintain an action to remove a cloud from her inchoate right of dower.⁹⁴ Where the inchoate right of dower is affected by the decree, the wife is a necessary party to the action.⁹⁵ The wife has a right of action, where she has been defrauded of her dower, and where there has been fraud and her right of dower is involved. Dower, inchoate and present, can only be released by the voluntary act of the wife or widow.⁹⁶ The inchoate right of dower is such an interest as will be protected in partition.⁹⁷

The wife's right of dower, although not admeasured, is an absolute right, which is assignable.⁹⁸ Before assignment of dower, the widow has no estate in the lands, of her husband ; her right is a mere chose in action ; her receipt of one-third of the rent of the real estate, in lieu of dower, for several years after the death of her husband, does not constitute an assignment of dower, and is not a bar to an action therefor. To constitute an assignment, the agreement or contract of the widow must be her specific act, and such agreement or act should clearly manifest that was her intention.⁹⁹

⁹³ *Conover v. Porter*, 14 Ohio St. 450.

⁹⁴ *Madigan v. Walsh*, 22 Wis. 501; *Weston v. Weston*, 46 Wis. 134.

⁹⁵ *Damm v. Moon*, 48 Mich. 510.

⁹⁶ *Yazel v. Palmer*, 81 Ill. 82. See 39 Ill. 75; 23 Id. 641; 29 Id. 442; 21 Ga. 161; 15 Ohio St. 493; 27 N. J. Eq. 534.

⁹⁷ *Lee v. Lindell*, 22 Mo. 202; *Weaver v. Gregg*, 6 Ohio St. 547. See 32 Ohio St. 210; 15 Id. 510; 28 Wis. 266; 53 Cal. 658; 7 Week. Notes, 197.

⁹⁸ *Pope v. Mead*, 99 N. Y. 202. See 8 N. Y. 110; 1 Barb. 500; 2 N. Y. 245; 5 Barb. 438; 26 Johns. 412; 87 N. Y. 153; 15 Johns. 477; 3 Barb. 643; 45 Id. 317.

⁹⁹ *Aikman v. Harsell*, 98 N. Y. 186. See 2 Hill, 547; 11 Barb. 579; 67 N. Y. 404; 73 Ill. 405; 20 Johns. 411; 2 Scribner on Dower, 30.

The wife shall be endowed where the husband had seizin in law, as well as where he had an actual seizin. And, therefore, if, after descent of land, the husband dies before entry, his wife shall be endowed. She shall also be endowed, though the seizin did not continue till the death of the husband ; as, if a man seized in fee takes a wife, and then sells his lands to another and his heirs, she shall be endowed, though the estate of her husband be evicted by an older title, after the end of the eviction.¹⁰⁰ The right of dower is inchoate and contingent until the death of the husband, and before that event is, as respects the wife, under the absolute control of the legislature ; and it is competent for the legislature to enact that deeds theretofore executed, under a joint power of attorney from husband and wife, shall be valid and binding.¹⁰¹ Where property is sold at a chancery sale, and the purchaser, believing that he had a good and sufficient title, placed valuable improvements upon the property, such as manufacturing buildings, and it appeared, on a bill being filed, that the estate was subject to dower, the court held that inasmuch as it would inequitable for the complainant to be benefited by the improvements at the expense of the purchaser, or for her to be admitted to a partnership in the manufactory, or in the improvements, it would be proper, and the court had power to decree an annual payment to the complainant in lien of dower, equivalent to the annual value of her interest in the estate.¹⁰² A voluntary partition by deed made by the

¹⁰⁰ Co. Litt. 31, 32.

¹⁰¹ Randall *v.* Krieger, 2 Dill. 445; 7 West. J. 625.

¹⁰² Lewis *v.* James, 8 Humph. 537.

husbands, without their wives, being equal, and followed by possession in severalty, will restrict the dower rights in equity to the several parcels.¹⁰³

¹⁰³ *Totten v. Stuyvesant*, 3 Edw. Ch. 500.

CHAPTER XX.

UNKNOWN OWNERS.

THE statutes of nearly all the States in the Union have been so designed that they furnish all the means necessary to make partition binding and valid against all persons who may be made parties to the action ; but the law had to meet a difficulty in the fact that oftentimes some of the tenants in common or joint tenants of the land are unknown, they living at such a distance from the premises, and under such circumstances, that it becomes an impossibility to ascertain their names in order to bring about a valid judgment for partition as against all persons, known and unknown owners. The law in most States has been so made that unknown owners may be brought in and become subject to the jurisdiction of the court, after which a judgment can be rendered binding and valid as against such unknown owners. In such cases, it is the duty of the court to take care of the interest and preserve and protect the rights of such persons. The New York statutes provide : " If the persons entitled to any such estate in dower, by the courtesy or for life, be unknown, the court shall take order for the protection of the rights of such persons, in the same manner, as far as may be, as if they were known and had appeared."¹

¹ 3 R. S. 6 ed. 592, § 64.

Every person who is entitled to an estate in the property sold, and who shall be made a party to the action as an unknown owner or unknown defendant, the court will provide for their protection and the protection of his or her interests, so far as the same may be known and appears to the court.¹ A judgment in partition under the statute, where part of the premises belongs to owners unknown, is not valid, unless it appear upon the face of the record that the affidavit required by the statute, that the petitioner or plaintiff in partition is ignorant of the names, rights or titles of such owners, and that the affidavit was duly presented to the court, and that the notice also required in such cases was duly published.² If such an affidavit should be admitted; the record of the partition suit to be produced on the trial would be insufficient and would not give the court jurisdiction in the action. The statutes require, where the action is such that proceedings are required against unknown owners, that the petitioner shall not only state in his petition that the parties and the extent of their interest in the land, are unknown to him, but it shall also be accompanied by an affidavit stating that the petitioner is ignorant of the names, rights and titles of such persons. If such averments were omitted in the affidavit, the court would not have jurisdiction of the unknown owners. The court must have jurisdiction not only of the subject-matter, but of the persons or parties to the action.³

¹ If a person, entitled to an estate or interest in the property sold, is made a party as an unknown defendant, the court must provide for the protection of his rights, as far as may be, as if he was known and had appeared. N. Y. Code Civ. Pro. § 1572. See L. 1814, 249; 1 R. L. 513.

² *Denning v. Corwin*, 11 Wend. 647; citing 15 Johns. 141; 19 Id. 33.

³ 5 Johns. 41; 8 Id. 90; 15 Id. 121; 19 Id. 33; 6 Wend. 447.

To make the title perfect, all persons who are in any way interested in the premises, or who have any rights therein, known or unknown, must be make parties to the action ; and the record must show that service was had upon such persons in pursuance to the rules of court, either a personal service, a service by publication, or personally, without the State, or substituted service ; and it should appear that the defendant is in custody of the court, or duly served with process pursuant to its rules.⁴ The record of the judgment must show that the law and the rules of the court have been fully complied with, and that the court had jurisdiction of that with which it dealt. If the record show upon its face that the court acted without jurisdiction, the proceedings before it are void, and the whole of its proceedings in the case are a nullity.⁵

The statute of Mississippi provides that where a defendant cannot be found, a writ of *capias ad respondendum* shall be served, by leaving a copy with the wife of the defendant, or some proper person above the age of sixteen years, found at his usual place of abode.⁶ This mode of service may be used in that State in partition cases, where the defendant upon whom it is served is absent from his last place of residence, and conceals or secretes himself, so that his sojourn, or place of concealment, cannot be found ; and, if his interest in the lands sought to be partitioned be unknown, or his rights cannot be ascertained at the time of the commencement of the action, such service would legally bring him within the jurisdiction of the court, and the judgment rendered

⁴ *Jackson v. Brown*, 3 Johns. 459 ; 13 Id. 489 ; 8 Cow. 370.

⁵ *Borden v. Fitch*, 15 Johns. 141 ; *Mills v. Martin*, 19 Id. 33.

⁶ *Harris v. Hardeman*, 55 U.S. (14 How.) 334. See 3 Miss. 35 ;

1 *Smedes & M.* 515, 595.

by the court would be binding upon him and his heirs forever.

Where proceedings against unknown owners are conducted in accordance with the laws and the rules of the court in which the action is brought, the co-tenants not named in the proceedings are as much bound by the judgment as those who are named and who were brought before the court by their proper names. Where a final judgment in partition, obtained in proceedings against unknown owners, comes in question collaterally, such owners are as fully concluded by it from questioning the fact of the complainant's seizin, as if they had been made parties to the proceedings by name. The proceedings previous to such judgment will be presumed regular, until the contrary appear.⁷ When such a judgment or decree is collaterally called into question, one must naturally expect to find that some courts will refuse to give it effect unless all the facts authorizing all the proceedings against such unknown owners are shown to have existed; and the courts will require, in the absence of such facts, that there be affirmatively established such absence, and will incline to consider mere defects in the partition proceedings as involving nothing serious, and nothing beyond the erroneous exercise of an established jurisdiction, assumed by the court before whom the proceeding was had.⁸

If the petitioner or plaintiff does not know who the co-tenants, or all of the co-tenants are, he may allege sufficiently as to his own ownership in the property fully

⁷ *Coles v. Hall*, 2 Hill, 625; citing 1 Hill, 23, 141, 489, 496; 11 Wend. 647; distinguished in 37 Barb. 355; cited in 96 N. Y. 531; *Rogers v. Tucker*, 7 Ohio St. 428; *Foster v. Abbott*, 8 Met. 598. See 10 Wis. 320.

⁸ *Waltz v. Barroway*, 25 Ind. 381. See 2 Hill, 627.

explaining his own position as a co-tenant, and further adding the fact that he is such co-tenant together with others to him unknown, who have an interest in such premises. In such cases, notice is to be given to all persons interested in the premises, by personal service where known and where personal service can be had, or by publication or substituted service where unknown, or where personal service cannot be had. If the partition be regularly made, and the judgment decreed pursuant to the petition, and all things have been done by the petitioner, which are required by the practice, such judgment is valid to all intents and purposes, and binding upon all parties known and unknown whose interests were before the court.⁹

⁹ *Baylies v. Bussey*, 5 Greenl. 157; *Foxcroft v. Barnes*, 29 Me. 129; *Kane v. Rock River Canal Co.*, 15 Wis. 186; *Nash v. Church*, 10 Wis. 311; *Herr v. Herr*, 5 Penn. St. 428; 47 Am. Dec. 416.

CHAPTER XXI.

SALE.

IF a sale of the premises is desired, then the complaint should contain a demand that the lands be sold. It is proper that the prayer for relief should first demand that a partition of the premises be had, providing such partition could be made without injury to the rights and interests of those who are owners of the premises ; and, if the partition and division of the premises among the respective co-tenants would be injurious to the interests of such co-tenants, then a sale should be had, and that sale should be so conducted, and all the previous proceedings in the case should have been so conducted that the purchaser at such sale will receive a proper and sufficient title of the premises purchased by him. The courts of Tennessee have held that a sale of the property cannot be ordered, unless the complaint contains in its allegations those facts required by the statute to be proven to authorize the court to direct a sale.¹

This rule cannot be considered general. The manner and form in which the partition or sale is to be made, in most States, constitutes no part of the cause of action, but it is a part of the relief to which the petitioner or complainant is entitled ; and that relief to which he is

¹ *Ross v. Ramsey*, 3 Head, 16.

entitled depends upon the facts which he can prove, when it becomes necessary for him to present his cause of action to the courts. If a sale can be had, and it is the wish of all who are concerned in the action that a sale should be had, then it will be decreed by the court. If, on the other hand, the parties to the action did not agree that there may be a sale, then it is the duty of the court to examine into the case in all its particulars, and, if proper, to decree that the premises be divided and allotted among the co-tenants according to their respective rights and interests; but, if such division is not proper, then to decree a sale, which sale is governed by the rules and regulations laid down by the court, and subject to the control of the court, and must be within the statute making provision for such actions. The complaint is not bad because it may allege reasons why there should be a sale, but its silence upon those questions is not injurious to it.² Whether a partition can or cannot be made is purely a question of fact, and the constituent facts or purposes are merely probative, and need not be averred, but may be claimed. The alleged facts claimed upon the part of the plaintiff favoring a sale as a usual thing is surplusage, when set up in the complaint. It is not necessary to show when the right to partition accrued, as in general the statutes of limitation have no application.³

The interlocutory judgment must make directions in regard to the sale, if a sale is to be had. By the interlocutory judgment, the court may decree whether there shall be terms of credit given upon such sale; and, if credit be given, it may decree how, and how secured, or

² *De Uprey v. De Uprey*, 27 Cal. 331.

³ *Jenkins v. Dalton*, 27 Ind. 78.

in other words, it may consider the amount of the purchase money for which credit is given as an investment. By the interlocutory judgment, the court may control in all its particulars that investment.³ The interest of every person in the premises shall pass by a sale, providing such sale shall have been ordered and decreed by the court, and the person purchasing the property upon the sale, his heirs and assigns thereafter hold such premises as his own, free and discharged from all claims by virtue of any estate or interest that may have been thereon, and thus holds it whether the same be to any undivided share of a joint tenant, or a tenant in common, or to the whole or any part of the premises so sold.⁴ The court may decree a sale, which will give the purchaser a perfect title to the premises discharged of all liens and incumbrances. The New York statutes have altered the law, to some extent, on this subject by authorizing the court to decree a sale, which will give the purchaser such perfect title.⁵ Purchasers at judicial sale have a right to receive, at the hands of the court, such titles as are free from all reasonable objections;⁶ and for that reason, it is the duty of the court in making the interlocutory judgment to scan all the proceedings in the case with the utmost care, so that upon the sale the purchaser may receive that to

³ The court must, in the interlocutory judgment for a sale, direct the terms of credit which may be allowed for any portion of the purchase money, of which it thinks proper to direct the investment, and for any portion of the purchase money, which is required to be invested for the benefit of a person, as prescribed in this article. N. Y. Code Civ. Pro. § 1573.

⁴ 3 N. Y. R. S. 6 ed. 592, § 60; N. Y. Laws 1814, p. 249; R. S. 513, § 15.

⁵ *Harwood v. Kirby*, 1 Paige, 469. See 2 R. S. 4 ed. 585; *Hopkins*, 501.

⁶ *Blakely v. Calder*, 13 How. Pr. 476, *ante*.

which he is entitled, and should not grant a decree of sale among the heirs, when it appears that the personal property is insufficient to pay the debts of the ancestor. Because, it is not the business of a court of equity to undertake the administration of estates in the first instance, nor to take the administration out of the hands of persons who have been duly appointed for that purpose, and who are in no way in default.⁷ There should be no unreasonable delay in perfecting the sale, so as to compel the purchaser to receive the title.⁸

The statutes of Kentucky require that when the lands of a married woman are to be sold, who is an infant, a proper bond shall be given to her subject to the approval of the court, which bond must be required by the court securing to her her share of the lands about to be sold.⁹ In America, it is the universal rule that infancy does not suspend or prohibit the right of an adult co-tenant to enforce partition.¹⁰ This rule is applicable to a sale of the property, where a division of the same cannot be had among the co-tenants, and the court will take care of and protect for the infant such parts of the proceeds as may belong to him by reason of his being a co-tenant in the land. It would be unreasonable to say, that the rights of the adults were debarred because a certain portion of the co-owners of the premises were infants, and that the interests of those infants do not require that the

⁷ *Matthews v. Matthews*, 1 Edw. Ch. 564; citing 3 Paige, 653; adhered to, 7 Paige, 391; overruled in Id. 411; approved in 23 Hun, 119, 121; commented on in 4 Edw. 47, 48.

⁸ *Jackson v. Edwards*, 22 Wend. 498. See 55 N. Y. 15. Effect of sale on inchoate right of dower: Hoffman, 468; 2 N. Y. 251; 13 Am. R. 526; 11 Hun, 410; 28 Mich. 23; 52 Mo. 100.

⁹ *Horsfall v. Ford*, 5 Bush, 644.

¹⁰ *Hooke v. Hooke*, 6 Lou. 474.

land should be sold.¹¹ If the infant is regularly brought into court, so that the court has jurisdiction of him so far as the action is concerned, the sale decreed in the action is as effectual against the infant as it is against any adult defendant who is also within the jurisdiction of the court.¹² The sale cannot be set aside, after the court has gained jurisdiction and made its decree in proper form and manner, for any irregularities or errors in the subsequent proceedings, providing the jurisdiction of the court over the person and property of the infant was properly gained in the action.¹³ If there has been collusion or fraud upon the part of the adult co-tenants as against the rights and interests of the infants, so as to give the infant an unequal portion of the proceeds, or in any way to injure the infant in his interest, or in any way to debar him of any of the rights, or to jeopardize and imperil his interest in the property by any collusion or treachery upon the part of such adults, the court would necessarily set all the proceedings aside for the purpose of protecting such infant defendants, as it is its duty to protect all persons who may be within its jurisdiction, who may have resting upon them any disability which does not allow such persons to protect themselves in the action.¹⁴

When the court directs that a sale of the premises be had, that terms of credit be given for a portion of the purchase money, such credit must be to the effect that

¹¹ *Albright v. Flowers*, 52 Miss. 246; *Coker v. Pitts*, 37 Ala. 693.

¹² *Fiske v. Kellogg*, 4 Oreg. 503; *Savage v. Williams*, 15 La. Ann. 250. See 63 Ill. 462; 41 Mo. 413.

¹³ *Richards v. Richard*, 17 Ind. 636; *Hite v. Thompson*, 18 Mo. 461.

¹⁴ *Long v. Mulford*, 17 Ohio St. 484; *Merritt v. Shaw*, 15 Grant Ch. 323.

the portion of the purchase money, so upon credit, must be secured or be upon interest, and the security must be a mortgage upon the property sold, with the bond of the purchaser, together with such other security, if any, as the court may deem proper and just.^b The responsibility for the proper and safe investment of the funds upon which credit is given, rests with the court, and it is the duty of the court to see that it is so secured, that, if not paid in accordance with the terms of such bond and mortgage so given by the purchaser, a collection thereof can be enforced. The officer making the sale may take separate mortgages and other securities for such portions of the purchase money as may be directed by the court to be invested. In case that the owners of the shares, or part of the shares to be invested, are of full age, and such owners desire, the investment of such mortgages may be taken in the names of such adult owners respectively, otherwise to run to the county treasurer of the county in which the property is situated.^c

The court may direct that the share of an infant be paid over to his general guardian, but it is better and more usual that the court direct that such share be invested in permanent securities for the benefit of such

^b The portion of the purchase money, for which credit is so allowed, must always be secured at interest, by a mortgage upon the property sold, with a bond of the purchaser; and by such additional security, if any, as the court prescribes. N. Y. Code Civ. Pro. § 1574.

The officer making the sale may take separate mortgages and other securities in the name of the county treasurer of the county, in which the property is situated, for such convenient portions of the purchase money, as are directed by the court to be invested; and in the name of the owner, for the share of any known owner of full age, who desires to have it invested. N. Y. Code Civ. Pro. § 1575.

infant.¹⁵ The New York statutes make provision for the payment of the infant's share to the general guardian, and not to the guardian *ad litem*.¹⁶ The decision of this last case cited is more to the effect that the interest or the share of the infant defendants in the proceeds of the sale ought not to be paid to the guardian *ad litem*, but should be brought into court, and, under, and by the direction of the court, invested for the benefit of such infants. That decision is made, not under the law allowing credit to be given for any part of the purchase money, but under the statute making it the duty of the court to protect the infant in all judicial sales of property wherein he may be interested, and upon the assumption that the sale has been made for cash; that the purchaser has paid for the property; that the share of the infant is before the court for its further order. The husband is not entitled to that portion of the proceeds of the sale on partition that belonged to his infant wife. His interest in such share is no different than that of any disinterested person, and he has not the right to have the same, or to use the same for his own benefit, or in his own business, even though his infant wife should consent. The same must be by the court secured by proper investment for her benefit, until she shall become of full age.¹⁷

The court has power to adjust and secure the rights of the parties in the proceeds of the sale, whether such rights be legal or equitable.¹⁸ The sale of the premises is usually had upon the report of the referee, who is

¹⁵ Robison *v.* McGregor, 16 Barb. 531.

¹⁶ Carpenter *v.* Schermerhorn, 2 Barb. Ch. 314.

¹⁷ Sears *v.* Hyer, 1 Paige, 483.

¹⁸ Milligan *v.* Poole, 35 Ind. 64; Gregory *v.* Gregory, 69 N. C.

appointed by the court to take evidence of the facts and circumstances surrounding the premises and the position of the parties as to their ownership, and, also, to take evidence as to the material allegations set forth in the complaint. The statutes provide that instead of appointing commissioners in the first instance to make partition, if it appear by the report of a referee that the premises or any part of them are so situated that a partition thereof cannot be had without great prejudice or injury to the owners, the court may order that such premises be sold at public vendue, by a referee or some proper officer appointed for the purpose of conducting such sales, and that there shall be given a notice of the time and place of holding the sale, in the same manner as if the sale should have been made by commissioners appointed for that purpose, and, upon the report of the referee or officer making the sale being confirmed by the court, the court will direct him to execute the necessary conveyances to the purchaser or purchasers of the property. Such conveyances will have the same effect, as if executed by the commissioners.¹⁹ Such sale may be made by the sheriff instead of a referee. The order may direct that the sheriff of the county be the one to whom it be referred to make such sale. The order directing a sale shall give specific directions as to the disposal of the surplus proceeds of the sale, if any there be.

After a sale shall have been had, the officer making it must immediately file with the clerk his report of such sale, which shall be under oath, and shall contain a description of each parcel of land sold, and the name of the purchaser or purchasers thereof, and the amount for

¹⁹ Jennings *v.* Jennings, 2 Abb. Pr. 6.

which it was sold.⁴ The order for the sale will not be made, unless the court is satisfied that a necessity for such order exists. It is necessary, therefore, that the acts and circumstances be stated upon which the opinion of the commissioners is founded.²⁰ The court has no authority, in a partition suit, to order a sale of the premises, unless the court shall be satisfied that they are so situated that a partition cannot be made without great prejudice to the owners. Where there is no serious difficulty in effecting an actual partition of the premises, to make a decree of sale asked for by the plaintiff would be an arbitrary interference with the rights of the property. It would be such an interference that would compel owners, under color of partition, to sell their lands against their will, and turning real property into a personal estate; and, if in such a case any of the co-tenants were minors, such a decree would be to the great hazard of the minors, and to the injury of those who, in case of the death of such minors, would be their heirs. The court would not, in making such an order, exercise a power inconsistent with the spirit of the Constitution, and inconsistent with both the spirit and the letter of the statute, and, also, inconsistent with private rights and individual privileges. The court has no such authority, and can only decree a sale when the facts and circumstances, as shown before, show that the plaintiff is entitled to a sale within the statute.²¹

⁴ Immediately after completing the sale, the officer making it must file with the clerk his report thereof under oath, containing a description of each parcel sold, the name of the purchaser thereof, and the price at which it was sold. N. Y. Code Civ. Pro. § 1576.

²⁰ *Tucker v. Tucker*, 19 Wend. 226, *ante*.

²¹ *Fleet v. Dorland*, 11 How. Pr. 489; citing 19 Wend. 226; 2 Barb. Ch. 398; 19 Wend. 365. See 46 Wis. 362; 45 Ind. 318.

The rights of those having liens upon the premises are protected upon the sale. This protection is by the operation of the law ; the interest or lien of the lienholder, if against the whole premises previous to the sale, attaches itself to the whole of the proceeds thereafter. If the lien is only against the share or portion of one of the co-tenants, it attaches itself to the share or portion of the proceeds derived from the sale, and belonging to such co-tenant ; and the rights and interest of a lienholder can in no way be lost by reason of the sale. It is not the business of the court to decide, or even to discuss conflicting claims and rights, or the equities of an incumbrancer, so as to direct a sale ; but it is the duty of the court to decide such questions as may arise in regard to the liens or conflicting claims between the lienholders after the sale in regard to their rights to any part of the moneys, which are the proceeds of such sale.²² When a lien becomes attached to one of the co-tenant's interest pending the action, the purchaser takes the premises discharged of any such lien, and the lien attaches itself, and becomes a charge upon the proceeds of such sale belonging to the co-tenant against whose share the lien was.²³ One purchasing the shares of some of the tenants in common of land, pending a suit in equity, ofttimes becomes seized of such shares, and, if he dies, and the decree direct the land to be sold, his widow will be entitled to her dower in the proceeds arising from such shares. On such a purchase, and a subsequent sale under the decree in the suit, the inchoate right of dower of

²² *Owslay v. Smith*, 14 Mo. 155; *Thurston v. Minke*, 32 Md. 574.

²³ *Arnold v. Butterfield*, 92 Ind. 403. See 8 Ohio St. 649; 24 Ill. 310.

the purchaser's wife, and all liens affecting his share, become a claim upon the proceeds of the sale.²⁴ A stranger not having notice of the pendency of such an action, would be protected in his rights.²⁵ The lien or right of such persons is transferred from the land itself to the moneys derived by the sale of the land. Questions arising in regard thereto must be contested upon an application for the moneys, as the sale is usually understood to be free from incumbrances ; and the reference will be to take proof as to the extent and validity of the liens.²⁶ If a sale has been ordered to be made upon credit, a person, who holds a lien upon the premises, cannot compel the sale to be made for cash, in order that his claim may thereby be paid.²⁷

The power of the court has been enlarged, both in England and America, so that it can permit a sale of the premises upon an action brought for the purpose of partition, or what is commonly known as an action in partition. Under the old law, the courts had no right to decree a sale, but must decree that there be an actual partition of the land. This oftentimes was injurious to the co-owners, and even made a partition suit a matter of speculation upon the part of some one of the co-owners, who believed that he could derive an unjust advantage and unrighteous gain by compelling the lands owned in common, to be parceled out among the co-owners thereof.²⁸ America was the first to make the advance

²⁴ *Church v. Church*, 3 Sandf. Ch. 475 ; citing 9 Paige, 200.

²⁵ *Westervelt v. Haff*, 2 Sandf. Ch. 107.

²⁶ *Henry v. Auld*, 8 Va. L. J. 54 ; *Steen v. Clayton*, 32 N. J. Eq. 121. See 55 N. Y. 442 ; *Harp. Eq.* 256.

²⁷ *Stern v. Epstein*, 14 Richards Eq. 7.

²⁸ *Deloney v. Walker*, 9 Porter, 497 ; *Harkins v. Pope*, 10 Ala. 499 ; *Turner v. Morgan*, 8 Ves. 143.

step in the law settling forever the rights of the courts to decree a sale, instead of compelling an actual partition. It is true that the matter was brought to the attention of the English courts, but it was left for the American courts to bring about a final settlement of the question, so as to establish that a court of equity had a right to do equity by decreeing a sale of the premises, when it could not do equity by compelling a partition and division. A sale will not be ordered without a good and sufficient cause shown. The applicants for the sale must state the existence of sufficient facts and circumstances to show to the court that a sale of the premises should be had. The preponderance of the proof is upon him who seeks the sale.²⁹ The sale is proper when it is for the interest of the co-tenants that one should be had;³⁰ and can be granted when it is a matter of great convenience, and the partition cannot be made without great inconvenience.³¹ It should be ordered when it is for the best interest of all the parties concerned.³²

If the parties are not entitled to partition of the premises, providing they were so circumstanced that a partition and division could be had, then they are not entitled to a sale of the same, and the court would not be justified in decreeing a sale under such circumstances.

²⁹ *Davis v. Davis*, 2 Ired. Eq. 607; *Gregory v. Gregory*, 69 N. C. 522, *ante*; *Johnson v. Olmstead*, 49 Conn. 517; *Scott v. Guernsey*, 48 N. Y. 125.

³⁰ *Helm v. Franklin*, 5 Humph. 405.

³¹ *Baldwin v. Aldrich*, 34 Vt. 529.

³² *Fleet v. Dorland*, 11 How. Pr. 490, *ante*; *Trull v. Rice*, 85 N. C. 327; *Tucker v. Parks*, 70 Ga. 414; *Wilson v. Duncan*, 44 Miss. 642; *Thurston v. Minke*, 32 Md. 576, *ante*; *Burgess v. Eastham*, 3 Bush, 476; *Branscomb v. Gillian*, 55 Iowa, 235. See 40 Wis. 361; 57 Am. Dec. 198; 49 Id. 660; 105 U. S. 401; 49 Conn. 509; 34 La. Ann. 969; 73 Ill. 405.

Neither can two distinct parcels of land be joined in one suit, for the purpose of partition and sale, unless such parcels of land shall be owned by the same co-tenants,—that is, the persons who are the co-tenants of one parcel must be the co-tenants of the other parcel, so that the two parcels may be partitioned or sold, as the case may be, in an action brought for that purpose.³³ Actual partition is a matter of right in common law. When a partition cannot be had without injury to the interest of those who own the premises as co-tenants, an actual sale and a division of the proceeds of such sale are as much a matter of right as an actual partition and division of the proceeds was a matter of right under the common-law rule.³⁴ In some instances, an appraisement of the property may be had, instead of an actual partition or enforced sale.³⁵

In some instances, a sale of the premises may be prejudicial to the interest of some and advantageous to the interest of the other co-tenants. Then there must be determined the question of whose interests shall be consulted and promoted. The court, in making its decision in an action of this kind, must take into consideration the statute which authorized a sale, and that the object of such statute was to obviate the manifest hardship that might arise in case of an enforced division of the property. When it is plain that a division of the property can be had at no disadvantage to any of the co-owners, then such division of the property should be had in preference to a sale; but, if it is to the prejudice of all the owners

³³ *Pankey v. Howard*, 47 Miss. 87.

³⁴ *Johnson v. Olmstead*, 49 Conn. 517, *ante*. See 1 *McCartner*, 489; 59 Ill. 103; 49 Md. 12; 76 N. C. 191; 23 Conn. 97; 45 Iowa, 510.

³⁵ *King v. Reed*, 11 Gray. 490; *Dyer v. Lowell*, 38 Me. 217.

of the property to have such division, then there should certainly be a sale. We think safe to say that the prejudice spoken of in the statute means a prejudice of all the owners or co-tenants, and not to a part of those co-tenants only.³⁶ The words "great prejudice," as used in the statutes, will not justify a decree of sale, where the aggregate amount of the benefits to the parties from a sale, instead of an actual partition, will be small, in reference to the value of the property of which a partition or sale is sought.³⁷

In some States the court decides whether a sale shall be had or not, without the assistance of commissioners. In New York, at an early day, it was held that the Court of Chancery could make such decision without the assistance or advice of such commissioners.³⁸ Such court has the authority to decide that a sale is necessary, and to decree such sale, where the ends of justice require it. It is the more usual practice to refer such questions to commissioners. The court makes its decree after having received the report, assistance and advice of such commissioners.³⁹ The court, in deciding upon a sale, usually appoints a referee or commissioners to make such sale, though under some of the statutes this duty falls upon the sheriff of the county in which the land is situate. The manner of conducting the sale, the duties and powers of the referee, commissioners or officers conducting the same, are laid down in the statutes of each of the States where the action of partition has become a statu-

³⁶ *Clason v. Clason*, 6 Paige, 545, *ante*.

³⁷ *Smith v. Smith*, 10 Paige, 470; citing 14 Wend. 204; 5 N. H. 134; 2 Blunt Amb. 589; 1 Peere Wms. 446. See 2 Barb. 601.

³⁸ *Thompson v. Hardman*, 6 Johns. Ch. 436.

³⁹ *Lake v. Jarrett*, 12 Ind. 395; 19 Wend. 226; 49 Am. Dec. 660; 43 Ga. 386; 59 Ill. 218.

tory action. But the usual practice under the Code, which will be explained hereafter in this chapter,—it being the practice of advertising the land a certain number of weeks, and of disposing of the same to the highest bidder, at public vendue,—is generally that practice which is safe to follow, and that practice which gives to the purchaser a perfect title of that which he purchased.⁴⁰

When judgment shall have been rendered in an action for partition, and a sale of such property is directed, the officer making such sale must, out of the proceeds which he receives from the sale, pay all taxes and assessments which are liens upon the property. The payment of taxes and assessments is something that must be done, otherwise the purchaser of the premises would not receive a good title, which is guaranteed to him under the statute, or, in other words, he should receive as good a title as the common ancestor had, which title should be free and clear from all liens, rights of dower, taxes or assessments.⁴¹ A person entitled to the surplus moneys upon such a sale, is not aggrieved because the court

⁴⁰ *Wainwright v. Rowland*, 25 Mo. 53; *Allen's Estate*, 11 Phila. 48; *Blue v. Blue*, 79 N. C. 69; *Fisher v. Hersey*, 78 N. Y. 387. See 17 Hun, 370; 57 Miss. 316; 90 N. C. 581; 16 S. C. 496; 8 W. Va. 249; 65 Mo. 290; 82 N. C. 377.

⁴¹ Where a judgment rendered in an action for partition, for dower, or to foreclose a mortgage upon real property, directs a sale of the real property, the officer making the sale must, out of the proceeds, unless the judgment otherwise directs, pay all taxes, assessments and water rates, which are liens upon the property sold, and redeem the property sold from any sales for unpaid taxes, assessments or water rates, which have not apparently become absolute. The sums necessary to make those payments and redemptions, are deemed expenses of the sale, within the meaning of that expression, as used in any provision of article second, third or fourth of this title. N. Y. Code Civ. Pro. § 1676.

makes an order requiring the referee to pay off the liens.⁴¹ If the premises are a leasehold, it is proper for the court to order taxes and assessments paid from the proceeds.⁴² The judgment should be entered in the county where the property is situated. If the action be in a county other than the county where the land is situated, the judgment then would be entered in the county in which it was rendered; but it also must be entered in the county where the land is situate. The clerk of the latter county must enter the same upon the judgment-book kept by him for that purpose.^f

The sale must be by public vendue to the highest bidder. Notice of such sale must be given by the officer making it, in accordance with the rules of practice relative to judicial sale of real estate. Notice of sale must be public. If the land be wholly situated in one county, it is sufficient if the publication of notice of sale be in that county alone. The terms of the sale must be made known at the time of the sale; and if the property, or any part of it, is to be sold subject to any right of dower or estate, that fact must be declared at the time of the sale by the referee, commissioners or officers in charge.^g The publi-

⁴¹ *Easton v. Pickersgill*, 55 N. Y. 310. See 77 N. Y. 203; 56 How Pr. 368; 11 Abb. Pr. N. C. 48; 33 N. Y. 203.

⁴² *Catlin v. Grissler*, 57 N. Y. 363. See 9 N. Y. Week. Dig. 434.

^f Where real property, sold by virtue of a judgment rendered in an action specified in the last section, is situated in a county other than that in which the judgment is entered, the judgment must be also entered in the office of the clerk of the county wherein the property is situated, before the purchaser can be required to pay the purchase money or to accept a deed. The clerk of the latter county must enter it in the judgment-book kept by him, upon filing with him a notice thereof, certified by the clerk with whom it is entered. N. Y. Code Civ. Pro. § 1677.

^g A sale, made in pursuance of any provision of this title, must be at public auction to the highest bidder. Notice of such a sale

cation, where the land is situated in a city, may be twice in one week for the space of three successive weeks in some daily newspaper published in such city.⁴³ The statutory provision as to selling is merely directory, and a sale not conforming thereto is not void, but voidable.⁴⁴ Three publications of the notice of sale of an advertisement for three weeks, instead of six, is an error, but can be amended.⁴⁵

An agreement preventing competition at a public sale,—that is, a contract founded on an agreement between two persons, the one holding the legal title and another,—is void as against public policy, and even though there has been performance on one side by the paying of money, the court will not interfere by compelling a specific performance of the agreement, or to compel a restitu-

must be given by the officer making it, as prescribed in section 1434 of this act, for the sale by a sheriff of real property, by virtue of an execution, unless the property is situated wholly or partly in a city in which a daily newspaper is published, and in that case by publishing notice of the sale at least twice in each week for the three successive weeks immediately preceding the sale, in one, or in the city of New York or the city of Brooklyn, in two of such papers. Notice of a postponement of the sale must be published in the paper or papers wherein the notice of sale was published. The terms of the sale must be made known at the time of sale; and if the property, or any part thereof, is to be sold subject to a right of dower, charge or lien, that fact must be declared at the time of sale. If the property consists of two or more distinct buildings, farms or lots, they shall be sold separately, unless otherwise ordered by the court; and provided, further, that where two or more buildings are situated on the same city lot, they may be sold together. N. Y. Code Civ. Pro. § 1678.

⁴³ Chamberland *v.* Dempsey, 22 How Pr. 356; citing 21 N. Y. 150; 5 Id. 497; Barnes, 74; 6 Bing. 377; 1 Chitty, 6, 7, 8.

⁴⁴ Cunningham *v.* Cassidy, 7 Abb. Pr. 183; 17 N. Y. 276. See 1 Johns. Ch. 502.

⁴⁵ Alvord *v.* Beach, 5 Abb. Pr. 451.

tion of the money paid.⁴⁶ The employment of what is known in law as a puffer, or a person to bid up the property as against *bona fide* purchasers, is a fraud, and a sale made under such circumstances will be set aside.⁴⁷ The auctioneer cannot legally be a bidder on his own account. Equity will not allow the party to retain the proceeds of a fraud committed by his own agent. Where false steps are taken to enhance the price of the property sold at auction, a court of equity will relieve the purchaser from the consequences and injury caused by such unfair means.⁴⁸ If the bidding of the puffers, or bidders, mislead and deceive a buyer in the interest of the owner, it will vitiate the sale.⁴⁹ Underbidding by the owner or auctioneer vitiates the sale.⁵⁰ Upon a sale of real estate by auction, under conditions stating that the sale is subject to a reserved bidding, it is illegal to employ a person to bid up to the reserve price, unless the right to do so is expressly stipulated for.⁵¹

The sheriff or party making the sale is liable to account to the parties interested for the proceeds of the sale of the land, although the attorney for the plaintiff may have conducted the sale, and have received such proceeds.⁵² On the sale in partition, the referee is entitled

⁴⁶ Wheeler *v.* Wheeler, 5 Lans. 355.

⁴⁷ Fisher *v.* Hersey, 17 Hun, 370; 3 Madd. 112; 2 Kent, 423; 3 Ves. 268; 2 Dev. 126; 12 Ves. 477.

⁴⁸ Veazie *v.* Williams, 8 How. U. S. 134.

⁴⁹ 3 Ves. 625; 12 Id. 477; 2 How. Pr. 28; 1 Brown, 346; 5 Ves. 508; 5 Madd. 34; 3 Bing. 368; 13 Ves. 25.

⁵⁰ Trust *v.* Delaplaine, 3 E. D. Smith, 219.

⁵¹ Gilliat *v.* Gilliat, 9 L. R. Eq. 60; 39 L. J. Ch. 142. See 6 Ves. 617; 8 Id. 337; Babington on Auctions, 164; 15 Pick. 300; Mason, 344; 20 Wend. 343; Ross on Sales, 311; 12 East, 632; 1 Hill, 317; 4 Pet. 328.

⁵² Van Tassel *v.* Van Tassel, 31 Barb. 439.

to commissions by virtue of the New York Laws of 1869, chapter 569, and the New York Laws of 1874, chapter 192 ; and also is entitled to the fees allowed to a sheriff in a foreclosure case.⁵³ The commission is for the receiving and paying out of the money, and for that alone. Commissions cannot be charged upon the amount secured by a mortgage, or the amount of a mortgage upon the premises, which remains there after the sale, the sale being subject to such mortgage.⁵⁴ If one sale falls through, and thereafter there is a sale, the party conducting the same can receive pay for only one sale.⁵⁵

The court may amend the judgment during the running of the notice of sale, and the validity of the sale is not affected by such amendment.⁵⁶ The court is not supposed to amend so as to affect the rights of any of the parties, but when an amendment is needed in the interest of justice and equity, it has the right to make it. It has been held, where upon a judgment of sale the sale was directed to be advertised three weeks instead of six, as required by law, but, in fact, the advertisement was published six weeks, that the error might be corrected on motion, and the purchaser be compelled to take title.⁵⁷ The question whether a sale is proper or not is one that must be determined by the circumstances of the case ; and whether it shall be sold in one parcel is also a question subject to the circumstances of the case and within the wisdom of the court.⁵⁸

⁵³ *Richards v. Richards*, 76 N. Y. 186 ; confirming 14 Hun, 25.

⁵⁴ *Strauss v. Hellman*, 58 How. Pr. 376.

⁵⁵ *Walbridge v. James*, 16 Hun, 8 ; 56 How. Pr. 185.

⁵⁶ *Valentine v. McCue*, 26 Hun, 456.

⁵⁷ *Alvord v. Beach*, 5 Abb. Pr. 451, *ante*. See *Gaskin v. Anderson*, 55 Barb 259.

⁵⁸ *Wallace v. Feely*, 61 How. Pr. 225. See 8 Civ. Pro. R. 126 ; to *Daly*, 331.

The commissioner, or officer, making the sale shall not, directly or indirectly, purchase, or be interested in the purchase of any part, or the whole of the property sold. Neither shall a guardian of an infant be likewise interested in the purchase of any of the property, except where he is legally authorized to do so for the benefit, or in behalf of his ward. Any person violating the law of the New York statute on that subject is guilty of a misdemeanor, and the purchase made by him is void.⁵⁸ An executor or administrator may bid in property for the estate of which he is the representative, for the purpose of saving to the estate the interest or lien upon the real estate that is to be sold which forms a part of the assets coming into the custody of the administrator or executor.⁵⁹ The purchase so made by him would be for the benefit of the estate, and would not be his individual property, as administrators and executors cannot speculate with the funds that are in their custody belonging to the estate of the deceased person whom they represent.⁶⁰ Where a trustee to sell, or one having power to sell in trust, bids in the property at the sale for himself, the transaction is not void, but voidable.⁶¹

⁵⁸ A commissioner, or other officer, making a sale, as prescribed in this title, or a guardian of an infant party to the action, shall not, nor shall any person, for his benefit, directly or indirectly, purchase, or be interested in the purchase of, any of the property sold ; except that a guardian may, where he is lawfully authorized so to do, purchase for the benefit or in behalf of his ward. The violation of this section is a misdemeanor ; and a purchase made contrary to this section is void. N. Y. Code Civ. Pro. § 1679.

⁵⁹ *Valentine v. Beiden*, 20 Hun, 537.

⁶⁰ 2 Johns. Ch. 252 ; 9 Paige, 237 ; 5 Sandf. 592 ; 19 How. U. S. 116 ; 1 Williams on Exec. 607 ; 8 Paige, 153 ; 6 Id. 448.

⁶¹ *Boerum v. Schenck*, 41 N. Y. 182. See 17 N. Y. 403 ; 9 Paige, 238 ; 5 Den. 157.

The fact that a fair value is received upon the sale of the premises, does not give a validity to the sale: nor is it material that the agreement might be void under the statute of frauds.⁶²

The sale shall be conducted in a fair manner. If the property that is exposed for sale consists of two or more lots, tracts, or parcels, each lot, tract, or parcel must be separately exposed for sale.⁶³ A written or printed notice of the sale must be conspicuously fastened up in three public places, in the town or city where the sale is to take place, and also in three public places where the land is situated. These notices must be fastened up, at least forty-two days previous to the time of sale. A copy of the notice must be published, at least once in each week for six successive weeks immediately preceding such sale, in a newspaper published in the county, if there is one; or if there is no newspaper published in the county where the land is situated, then in such paper as is provided for, or shall be provided for, in which legal notices are required to be published.⁶⁴ It is the duty of the officer making the sale to see that the notice is given as required by the Code.⁶⁵ The publication is sufficient, if inserted once in each week for six weeks before the sale, although six full weeks should not have elapsed between the date of the first publication to the day of the sale. In absence of proof to the contrary, it will ordinarily be

⁶² *Terwilliger v. Brown*, 44 N. Y. 237. See 26 N. Y. 53.

⁶³ *O'Donnell v. Lindsay*, 39 N. Y. Super. 523; *Sugwell v. Bussing*, 4 T. & C. 681; 48 How. Pr. 89.

⁶⁴ *O'Donnell v. Lindsay*, 39 N. Y. Super. 523, *ante*; *Olcott v. Robinson*, 21 N. Y. 159; *Wood v. Morehouse*, 45 N. Y. 369.

⁶⁵ N. Y. Code Civ. Pro. § 1434.

presumed in favor of a sale, that the sheriff has duly posted the proper notices.⁶⁶

On an order granting a rehearing, where it appears that when the case was before the court for the first time, it was reversed on the ground of a defect in the advertisement of sale, and that the proofs were not then all before the court, and by the perfected proofs it appears that there was evidence of the requisite advertisement of sale before the vice chancellor and a decision on that point which has not been appealed from, the decree of the court should be affirmed, and was affirmed. The court based the ground of its decision upon the fact that they found that there was evidence before the vice chancellor on the subject of putting up the requisite notices advertising the sale, and that there was a decision on that point. In proving title it is essential that the order or decree directing the deed to be made, and the deed itself, should be proved ; but it is not necessary that the regularity of the proceedings previous to the time of the making of the decree should be proven. And it has often been held that such a decree should not be opened or set aside upon the ground of fraud or mistake, upon petition of parties, by bill of review, or by a supplemental bill in the nature of a bill of review.⁶⁷

⁶⁶ *Wood v. Morehouse*, 45 N. Y. 368, *ante* ; confirming 1 *Lans.* 405 ; 21 N. Y. 150 ; reversing 20 *Barb.* 148.

⁶⁷ *Rudderrow v. Dudley*, 5 *Cent. R.* 802 ; *Obert v. Hammel*, 3 *Har.* 73. See 4 *Zab.* 476 ; 5 *Dutch.* 334 ; 4 *Id.* 32 ; *Whittemore v. Coster*, 3 *Green Ch.* 438 ; *Robertson v. Miller*, 2 *Id.* 451 ; 2 *McCartney*, 123 ; 2 *Beas.* 35, 36 ; 10 *C. E. Green*, 305.

CHAPTER XXII.

FINAL JUDGMENT CONFIRMING SALE.

IT is essential that the sale shall be confirmed by the court. Before the sale has been confirmed, although money may have been paid, and although the purchaser may have taken possession of the premises, the proceedings are not considered complete or final; and the sale should be confirmed by a final decree, made by the court for that purpose, which final decree shall be duly entered in the same office, together with the other proceedings pertaining to the action.¹ After the confirmation of the sale shall have been made, the purchaser of the premises, if he has not already done so, should then comply with the terms of his purchase, to entitle himself to a conveyance of the premises. Upon his failure to so comply, or for any sufficient cause, the court will direct a resale of the premises, which resale will be ordered after notice has been given to the purchaser of the intention of the court, and that application will be made to the court to make such order of resale.²

When the sale is confirmed by the court, a final judgment must be entered of such confirmation, and such

¹ *Loyd v. Loyd*, 16 N. W. R. 117; *Parkinson v. Caplinger*, 65 Mo. 290.

² *Burgin v. Burgin*, 82 N. C. 196; *Ex parte White*, 82 Id. 377.

final judgment will direct the officers, or officer, making such sale, to make, execute and deliver the proper conveyances, and to take such proper securities as may be within the direction and discretion of the court, as set forth in its previous decree. Such a final judgment is binding and conclusive upon the same parties, upon whom a final judgment in partition, where there has been an actual division and allotment of the land, would be binding ; and it effectually and forever bars each and every person, who is not a purchaser at the sale, and who has been brought properly within the jurisdiction of the court, from any or all right, title, interest, lien or claim in or to any part or the whole of the premises sold, and the purchaser receives a title of the premises so purchased at such sale by him, free and clear from any of the rights or interests of any person who may have a lien, title, estate, or right of possession of such lands.^a The purchaser at a sale has a right to require and receive a good title, and is not bound to take that which to him is an uncertainty, or to hazard his interests by taking such title, the result of which might bring on a contest or litigation with other parties.^b The partition should be respected, and in case there has been a sale of the property, that sale should be respected. The judgment of confirmation should not be

^aIf the sale is confirmed by the court, a final judgment must be entered, confirming it accordingly ; directing the officer making it to execute the proper conveyances, and take the proper securities pursuant to the sale ; and also directing concerning the application of the proceeds of the sale. Such a final judgment is binding and conclusive upon the same personis upon whom a final judgment for partition is made binding and conclusive by section 1557 of this act ; and it effectually bars each of those persons, who is nct a purchaser at the sale, from all right, title and interest in the property sold. N. Y. Code Civ. Pro. § 1577.

^b *Jordan v. Poillon*, 77 N. Y. 518.

decreed by the court, if the jurisdiction of the court is doubtful, or if its jurisdiction of the parties is not full and complete; but when the court properly has the subject-matter and all the parties before it, its decree confirming the sale, nothing appearing to gainsay it, should be respected.⁴ Under the statutes of New York State, when all the parties in being having any estate or interest, present or future, vested or contingent, in the lands, are made parties to an action for partition, a purchaser at a sale under a judgment therein, acquires perfect title to the land purchased by him. Such judgment is conclusive as to the rights of all, and the sale had is effectual to bar the future contingent interests of persons not *in esse* at the time, although no notice is published to bring in unknown parties, and although such future owners may take as purchasers, under a deed or will, and not as claimants under any of the parties to the action.⁵ The final order of sale in a partition suit has the force and effect of a judgment which binds the parties, where there is complete jurisdiction, whatever errors or irregularities may have preceded it. An omission from a referee's advertisement of sale of a portion of the lands embraced in the action and directed to be sold by the judgment, did not vitiate a sale by the referee of the omitted portion, where, upon motion made, on due

⁴ *McLenathan v. McLenathan*, 2 Pen. & W. 279; *Manly v. Pettee*, 38 Ill. 128; *Wood v. Fleet*, 36 N. Y. 499. See 4 N. Y. 257; 9 Johns. 270; 4 Id. 202; 20 Barb. 123; 25 Wend. 434; 3 Edw. Ch. 513; 22 Wend. 512; 1 Paige, 471; 7 Johns. 414; 4 Paige, 441; 3 Bosw. 430; *Pomeroy Remedies & Rem. R.* §§ 373, 374; 7 How. 307; 15 Johns. 160.

⁵ *Brevoort v. Brevoort*, 70 N. Y. 137. See 6 Sim. 643; 10 Paige, 473; 2 Freem. 26; 17 Ves. 552; Amb. 236; 15 N. Y. 617; 17 Id. 210; 37 Id. 59; 6 Ves. 498; 7 Paige, 544; 4 Ala. 475.

notice to all the parties interested, the sale was confirmed; and the irregularity was not a defect to the title acquired on such sale.⁶ Such an error is one which can be corrected by any party to the record upon proper application to the court.⁷ The final order of confirmation has the force and effect of a judgment which binds the parties, where there has been complete jurisdiction, whatever may have been the errors or irregularities which preceded it.⁸ The sale of real estate in which infants have an undivided interest, subject to the life estate of their mother, under a decree in a suit for partition, brought by one of the other tenants in common, does not change the character of the infant's estate in the proceeds, but they are treated as realty, and not as personality.⁹

The final judgment is a bar against any person who was not a party to the action, and who, at the time the judgment was rendered, had a general lien, by judgment or decree in his favor, upon the undivided share or interest of any one of the co-tenants to the property, providing notice was given to such person to appear before the referee and make proofs of the liens, as prescribed by the Code and by the rules of the court. But a person having a specific lien, and the same appearing upon the record at the time of the filing of the notice of pendency of the action, who is not made a party, is not affected by the judgment, and his lien or interest is not barred or cut

⁶ *Woodhull v. Little*, 102 N. Y. 165. See N. Y. Code, §§ 1386, 1532, 1595, 721; *Field Lawy. Br.* 495, 497.

⁷ *Abbott v. Curran*, 98 N. Y. 665.

⁸ *Blakely v. Calder*, 15 N. Y. 617, *ante*.

⁹ 1 *Hun*, 473; citing 3 *Sandf. Ch.* 456; 47 N. Y. 21; 4 *Paige*, 102; 1 *Duer*, 286.

off, by reason of the final judgment of confirmation.^b In case a contest should arise as to the distribution of the fund, and where several creditors or legatees are entitled to a ratable proportion of the common fund, which is insufficient for the payment of their debts or legacies, all the creditors or legatees should be made parties to a bill filed for the distribution of such fund; or a bill should be filed by a part of the creditors, in behalf of themselves and of all persons standing in like situation in reference to such fund.⁹

After completing the sale, the report of the referee or officer making the sale should be made to the court, under oath, and such report should contain a description of the different parcels of land sold to each purchaser, the name of such purchaser, and the price bid by him for the same; and such report should be filed with the court. The New York Revised Statutes provide, "If such sales be approved and confirmed by the court, an order shall be entered, directing the commissioners, or any two of them, to execute conveyances pursuant to such sales; which they are hereby authorized to do."¹⁰

^b Such a final judgment is also a bar against each person, not a party, who has, at the time when it is rendered, a general lien, by judgment or decree, on the undivided share or interest of a party, if notice was given to appear before the referee, and make proofs of liens, as prescribed in section 1562 of this act, and also against each person made a party, who then has a specific lien on any such undivided share or interest; but a person having any such specific lien appearing of record at the time of the filing of the notice of the pendency of the action, who is not made a party, is not affected by such judgment. N. Y. Code Civ. Pro. § 1578. See 12 Wend. 269; 10 How. 188; 27 Id. 289; 6 Abb. Pr. 59; 4 Paige, 481; L. N. Y. ch. 320.

⁹ Egberts v. Wood, 3 Paige, 517; citing 2 Ves. Sr. 311; 1 Paige 20; 13 Ves. 397; 14 Wash. C. Ct. 232; 5 Cranch, 300.

¹⁰ 3 N. Y. R. S. 6 ed. 593, § 73.

The Revised Statutes further provide that conveyances made and executed by the officer or persons making such sale, shall be recorded in the county where the premises are situated ; and that the same shall be a bar, both in law and equity, against all persons interested in such premises in any way whatever, who shall have been named as parties to the proceedings ; and against all such persons and parties who were unknown, if notice shall have been given of the application for partition, in the manner prescribed by law ; and shall also be a bar against any persons having general liens or incumbrances by reason of any judgment or decree on any undivided share or interest in the premises sold, providing they shall have had the notice recorded by the rules and practice of the court.¹¹

Upon the sales being confirmed by the court by its decree, the person or persons appointed by the court to make such sale, shall deliver the mortgages or other securities given by the purchaser pursuant to the judgment of the court allowing such mortgages or securities to be made, to the treasurer or chamberlain of the county, or to the co-owners, whose shares in the premises were thus invested.

¹¹ 3 N. Y. R. S. 6 ed. 593, 74, 75; *Mead v. Mitchell*, 17 N.Y. 217; 1 Edw. Ch. 629; 7 Paige, 386; 22 Wend. 520; 3 Paige, 656; 4 Id. 442.

CHAPTER XXIII.

COSTS.

THE costs and expenses in equity actions are, in general, to a certain extent, within the judicial discretion of the court ; and in the absence of any statutory provisions pertaining thereto, the court exercises its discretion wholly as to the costs and expenses, and as to what part of the property, or the proceeds of the sale of the property, shall be charged therewith.

In section 1559 of the New York Code of Civil Procedure, which has been referred to in another chapter in this work, we called attention to the fact that costs upon a final judgment are awarded as against unknown owners, or, rather, unknown parties. By that section provision was made that the final judgment for the partition of the property should award that each defendant pay to the plaintiff his proportion of the plaintiff's costs, including any extra allowance that might be decreed by the court ; and that the sum so paid should be fixed by the court, and fixed according to the respective rights and interests of the parties as set forth in such final judgment. The same section also makes provision, in case of an unknown defendant, that his proportion of the costs shall be fixed and specified in the judgment, in the same manner as if such defendant were known, and

chargeable to such unknown defendant's share, and payable from out of the proceeds of the sale of his share, as if he were known and personally present before the court ; and that an execution can be issued to collect the costs thus decreed against an unknown defendant, the same as if he were known and were named in the judgment. The right, share or interest of an unknown defendant in the property may be sold by virtue of such execution, for the purpose of collecting the costs decreed against him by the judgment.¹

Where it appears that the parties to the action are tenants in common of only a part of the land, and that partition is made of that part only, the defendant whose rights are attacked by reason of his being a tenant in common of that part of the land partitioned, but having the title or an interest in that portion of the land not partitioned, is entitled to his costs.² Necessary parties to the action, who are brought in without the consent or request of the defendants, are entitled to such costs and disbursements as may be necessarily incurred by them for the protection of their interest in the matter. Such costs will not be charged against the common fund, or the lands that are subject to the co-tenancy, but will be awarded against the defendant, and stand against him as a judgment in favor of such necessary party.³ The party cannot be charged with costs because he unreasonably refused to make partition by deed, although partition is a matter of right, to which any co-tenant in the land is entitled; but voluntary partition is something not consid-

¹ 7 N. Y. Legal Obs. 127; 1 Sandf. Ch. 40; 7 Paige, 204; 20 Barb. 541; 3 Code R. 9.

² Paine *v.* Ward, 4 Pick. 246. See 19 Pick. 539.

³ Hamersley *v.* Hamersley, 7 N. Y. Legal Obs. 127. See Williamson *v.* Williamson, 1 Metc. 303.

ered in the statutes regulating the action, and there is nothing in the law relating to or allowing a voluntary partition that charges to any co-tenant the costs and disbursements of a partition suit, commenced after the refusal, which perhaps may be an unreasonable refusal of one co-tenant to join with the others in a voluntary partition of the premises.*

If in proceedings for partition between the heirs of a common ancestor, some of the parties do not appear in the action, and no part of the land, or of the proceeds of the sale of the land, is allotted to such parties, by reason of advancements having been made to them in the life-time of the common ancestor, no costs can be charged to such parties, as they are not liable therefor.⁵ In case a bill in equity should be filed for the purpose of setting aside a deed in partition, on the ground that fraud was had in making the partition, or in making the deed, and the bill asked to have a new partition, not only of the lands previously allotted or sold, but also of other lands, which were not included in the former writ, the plaintiff failing to establish the charge of fraud, the court held that the bill should be retained and not dismissed, for the purpose of having a partition of the land, not embraced in the deed sought to be set aside, and that the plaintiff was liable for all of the costs of the defendant up to the time of the decree sending the case to the master.⁶

In a final judgment confirming the sale of the premises, the costs of each party to the action, and the expense of the sale, including the fees of the officer making such sale, and each party's costs must be paid to him or to his

* *McGowan v. Morrow*, 3 Code R. 9.

⁵ *Tanner v. Niles*, 1 Barb. 560, *ante*.

⁶ *Masterson v. Finnigan*, 2 R. I. 316.

attorney. The rule in New York State is that such costs shall be paid to the attorney of the party to whom the costs are awarded. The court may, in its discretion, and when proper, direct that the costs of any trial, reference, or other proceeding in the action, be paid out of the share of the proceeds of any one of the parties concerned ; and the court may decree that a judgment be entered against such party for the costs of such trial, reference or proceeding. This power is placed in the court, so that the court may protect innocent parties from any improper act done by one or more of the parties to the action. In proceedings as important as actions of partition, and where so many interests are involved, ofttimes, one or more of the parties may, by their own act, bring about unnecessary and unwarranted proceedings in court, which are of no aid in carrying out that which is justice to all concerned ; and if the costs were taxed as costs generally are in partition cases, such unnecessary and unwarranted proceedings would be something of a punishment upon the innocent parties, and ought not to be taxed upon it. Therefore, this power is given to the court, whereby it may protect those who are not guilty of such unwarranted and unjust proceedings against the act of those who are guilty. In case any part of the proceeds is to be paid to, or invested for the benefit of any person, as prescribed by the rules and regulations pertaining to partition, the amount of such payment or investment must be arrived at and determined by the amount of the residue of the entire proceeds remaining when the costs and expenses have been deducted that was chargeable against such funds.^a

^a Where final judgment, confirming a sale, is rendered, the costs of each party to the action and the expenses of the sale,

The general phraseology and provisions for the partition of lands contemplate an assignment to each owner of his respective portion, when such portion is capable of being ascertained. If the defendants in such proceedings wish to retain their proportions of the estate undivided, partition may be made accordingly, and their consent to such partition will be construed into an assent that a joint judgment be rendered against them for the costs of the action. When such a partition is made, it would be advisable to obtain from the court its direction pertaining thereto.⁷ Where the parties on each side of an action prove to be successful, and each becomes entitled to recover costs separately, the court has power, under section 3253 of the New York Code of Civil Procedure, to award additional allowances to each, provided the allowance to each side does not exceed \$2,000, or \$4,000 in the aggregate.

The power of the court to award to the guardian of an infant, to be paid out of the subject-matter of the action, such a compensation as appears to be reasonable for the services he has performed, does not depend upon the provisions of the Code of Civil Procedure,

including the officer's fees, must be deducted from the proceeds of the sale, and each party's costs must be paid to his attorney. But the court may, in its discretion, direct that the costs and expenses of any trial, reference, or other proceeding in the action, be paid out of the share of any party in the proceeds, or may render judgment against any party therefor. Where a proportion of the proceeds is to be paid to, or invested for the benefit of any person, as prescribed in any provision of this article, the amount thereof must be determined by the residue of the entire proceeds remaining after deducting the cost and expenses chargeable against them. N. Y. Code Civ. Pro. § 1579.

⁷ *McWhorter v. Gibson*, 2 Wend. 443. See 17 Wend. 540; 22 Ind. 58; 1 Dill. 247; 42 Wis. 294.

nor is it to be included in or limited by the sum of \$2,000 fixed by section 3254 of the New York Code of Civil Procedure.⁸ The guardian *ad litem* of an infant defendant can only be allowed his taxable costs, against a fund belonging to other parties in the case, unless there be something extraordinary and difficult about the case. In very special cases, the court is authorized to allow something beyond the taxable costs of the guardian *ad litem*, to be taxed upon the fund belonging to the infant.⁹ Extra counsel fees to the guardian *ad litem* of infants who have only contingent interests in the fund in litigation, cannot be allowed by the court, to be paid out of the fund which may eventually belong to other persons.¹⁰ The court has the power, in case the interest of one co-tenant should remain unsettled by the decree of partition, to reserve the question pertaining to the amount of costs that such co-tenants shall pay, until the further action by the court in reference to such co-tenant's interest.¹¹

Where, in an action of partition, the plaintiff, after decree, agreed to buy the interest of the defendant, and an order was made that he pay the purchase money into court, but the defendant died before conveyance, and her solicitors obtained a charging order of their costs in the action under the Attorneys and Solicitors Act of England, of 1860, section 28, and afterwards a stop order. Having been served with proposed minutes of order, on

⁸ *Weed v. Payne*, 31 Hun, 10; citing 4 Paige, 85, 87; 7 Id. 523, 544.

⁹ *Union Ins. Co. v. Van Rensselaer*, 4 Paige, 85. See *Clarke*, 399; citing 1 *Hopk.* 277.

¹⁰ *Gott v. Cook*, 7 Paige, 521. See *Nodine v. Greenfield*, Id. 544.

¹¹ *Phelps v. Green*, 3 Johns. Ch. 302, *ante*.

further consideration, they appeared by counsel and asked for their costs of obtaining the stop order and of their appearance. The court held that they must bear their own costs of obtaining the stop order and of their appearance.¹² The executor of the deceased plaintiff in a suit, who obtained the common order of revivor and prosecutes that suit, may, if defeated, be adjudged to pay the costs personally.¹³ To enter a judgment for costs against an executor or administrator personally, there must be a direction to that effect from the court.¹⁴ In rendering costs against an executor or administrator, care should be used by the court, and its discretion should not be exercised in an arbitrary manner; and, in some cases, unless such entry is specially authorized by statute, application for leave to enter judgment is necessary.¹⁵

A stipulation by the parties to an action, that the fees of a stenographer for taking the testimony may be taxed as costs, has the effect of submitting to the court the question as to the sum to be allowed, and waives the right to have the same determined by a jury. Under such a stipulation to tax stenographer's fees as costs in the case, if the court, on its own motion, refer the question as to the sum to be allowed, the referee's findings thereon are advisory merely, and the court has a right to confirm such findings, or to disregard them entirely and enter a decree entirely independent of the findings and upon the evidence returned by the referee. Under such

¹² *Mildmay v. Quicke*, 23 Moak Eng. 156.

¹³ *Boynton v. Boynton*, 26 Moak Eng. 81. See 3 Id. 748; 12 Id. 666; N. Y. Code Civ. Pro. § 3246.

¹⁴ *Woodruff v. Cook*, 14 How. Pr. 481. See 12 How. Pr. 305.

¹⁵ *Hamilton v. Homer*, 46 Miss. 378; 11 Abb. Pr. 258; 19 How. Pr. 469; 27 N. Y. 225; 12 N. Y. Leg. Obs. 262; 11 Barb. 242; 15 Hun, 308; 51 Ind. 159; 16 Grant, 115; 1 Eng. Ch. D. 588.

a state of facts, the appellate court may set aside the decree or findings of the trial court, with directions to enter an order in accordance with the findings of the referee.¹⁶ When all the evidence taken by the referee and upon which he makes his findings is reported by him to the court, the court may modify or set aside the report and make such findings as are warranted by the evidence and pronounce judgment thereon.¹⁷ It has been the practice in English courts of common law to allow an arbitrator to refuse the publication of his award, until his charges are paid.¹⁸ The Supreme Court of New York have extended this rule to referees, and, as late as 1880, it virtually decided that a referee was not bound to part with his report without the payment of his legal fees.¹⁹ Where the referee has his report ready within the statutory time and offers to deliver it on payment of his legal fees, such offer should be deemed a sufficient delivery to prevent the forfeiture under section 1019 above referred to.²⁰ Costs in equity are in the discretion of the court.²¹

The allowance for each additional defendant, as prescribed by the Code, means necessary defendants, or persons necessarily made parties to the action. An objection may be taken, upon the adjustment of the costs, that some of the persons named, and for which an allow-

¹⁶ Barnes *v.* Somerville, 4 West. R. 302. See 1 West. R. 737.

¹⁷ Ely *v.* Ownby, 59 Mo. 437; Smith *v.* Paris, 70 Id. 615. See 73 Id. 187.

¹⁸ Mussleburg *v.* Duncan, 9 Bing. 605. See Ott *v.* Schroepel, 3 Barb. 56, 62.

¹⁹ Geib *v.* Topping, 83 N. Y. 46; N. Y. Code Civ. Pro. § 1019; 56 How. Pr. 218; 5 Johns. 252; 9 Id. 114.

²⁰ Waters *v.* Shepherd, 14 Hun, 223; 83 N. Y. 48; 6 Dowl. P. C. 556; 1 Wils. 130.

²¹ Reed *v.* Rankin, 2 West. R. 879; Carpenter *v.* Davis, 72 Ill. 14.

ance is asked, are not necessary defendants.²² The voluntary appearance of several defendants entitles the plaintiff to the same costs as if such defendants had been regularly served with the summons.²³ Where there are several liens, and one or more of the owners contest the liens, the lienholders, who are successful in the establishment of their claim, should have costs, as against the owner or owners contesting the same.²⁴ Costs should always be adjusted according to the law in force at the time of the taxation.²⁵ Where a default has been taken before a change in the rate of costs, and costs are taxed after the change, the former law governs.²⁶

The New York statutes permit an additional allowance to be granted in partition cases, upon a sum, not exceeding \$200, of ten per cent.; upon an additional sum, not exceeding \$400, of five percent.; upon the further additional sum, not exceeding \$1,000, of two ~~and~~ one-half per cent. In case the action should be settled before final judgment, the plaintiff is entitled to a percentage upon the amount paid or secured upon the settlement, at one-half of the above rates.²⁷ The court has no discretion to make any allowance other than that prescribed, and the allowance can be to the plaintiff only.²⁸ If the case is difficult or extraordinary, the court may make an

²² *Case v. Price*, 17 How. Pr. 348; 9 Abb. Pr. 111.

²³ *Schwinger v. Hicks*, 1 Sheldon, 377.

²⁴ *Morgan v. Stevens*, 6 Abb. N. C. 356.

²⁵ *Morrow v. Westervelt*, 14 How. Pr. 279; 5 Abb. Pr. 14.

²⁶ *Huber v. Lockwood*, 15 How. Pr. 74; 14 Id. 79, 357; 18 Id. 532; 28 Id. 155. See 3 Den. 173; 1 How. Pr. 232; 11 N. Y. Leg. Obs. 119; 5 Abb. Pr. 14; 15 How. Pr. 74; 5 Abb. Pr. 219; 18 How. Pr. 385, 532; 15 Id. 430; 3 Robinson, 629.

²⁷ N. Y. Code Civ. Pro. § 3252.

²⁸ *Williams v. Hernon*, 13 Abb. Pr. 297. See 14 Abb. Pr. 161; 37 N. Y. 380.

allowance greater than the percentage set forth in section 3252.²⁹ The allowance can only be made to those who are entitled to the ordinary costs.³⁰ The right of the allowance accrues at the time of the verdict, though its amount will not be fixed till later.³¹ An extra allowance cannot be granted more than once.³² Where an extra allowance is made in a decree for partition and sale, a further extra allowance, on making a decree confirming the sale and directing the distribution of the proceeds, cannot be allowed.³³

The court may, in its discretion, in an action for the partition of real property, make an extra allowance, where the action is difficult and extraordinary, or where a defense has been interposed, not exceeding five per cent. upon the sum recovered, or claimed, or the value of the subject matter involved.³⁴ Additional allowances may be made in proper cases, whether the action is legal or equitable; and, as a rule, should be awarded only to the successful party.³⁵ In cases where default has been made, so that the plaintiff may take judgment, the additional allowance will not be awarded,³⁶ though some cases have held to a different rule.³⁷ In an action by one joint owner

²⁹ *Hunt v. Chapman*, 62 N. Y. 333; 49 How. Pr. 377.

³⁰ *Devlin v. Mayor*, 15 Abb. N. C. 31.

³¹ *Cook v. N. Y. Float. Dry Dock Co.*, 1 Hilt. 557.

³² *McDonald v. Mallory*, 9 N. Y. Week. Dig. 285; *Union Trust Co. v. Whiton*, 17 Hun, 593.

³³ 72 N. Y. 603; 11 Hun, 147.

³⁴ N. Y. Code Civ. Pro. § 3233.

³⁵ *Davis v. Glean*, 14 How. Pr. 310; 70 N. Y. 480; 3 Abb. N. C. 36; 10 Hun, 289; 4 Abb. N. C. 317; 7 Hun, 81; 70 N. Y. 140; 7 N. Y. Week. Dig. 472; 11 Hun, 192; 53 How. Pr. 86; 52 Id. 230.

³⁶ *Astor v. Palache*, 49 How. Pr. 231.

³⁷ *Coates v. Goddard*, 7 Abb. Pr. 339; 16 How. 364. See 7 Abb. Pr. 340; 56 N. Y. 659.

of a vessel against his co-owners for an accounting, the court may, in its discretion, grant an extra allowance, although, after the overruling to a demurrer, no answer is filed.³⁸ Additional allowances are proper in actions pertaining to real estate.³⁹ The application should be made before the entry of judgment;⁴⁰ and it can be only allowed or awarded by the court before which the trial is had.⁴¹ The motion for the additional allowance may be made at special term for the hearing of motion.⁴² If the trial has been had before a referee, the application must be made to the court for the allowance, upon notice to the adverse party; and the motion is subject to the same rules, with respect to the time and place at which it should be made, as any other motion. The court should be furnished with an affidavit of facts sufficient to enable it to form an opinion on the subject. The certificate of the referee alone is not sufficient, although that certificate may be proper among the papers to show what the facts are.⁴³ Where a mistake has been made, and the amount of additional allowance awarded is slightly in excess of the sum allowed by the Code, the remedy is by motion to correct the judgment, and not by an appeal.⁴⁴

When the recovery is set aside, the additional allow-

³⁸ *Darling v. Brewster*, 55 N. Y. 667.

³⁹ *Fisher v. Hepburn*, 48 N. Y. 41.

⁴⁰ *Martin v. McCormick*, 3 Sandf. 755. See 29 How. 97; 34 N. Y. 355.

⁴¹ *Van Rensselaer v. Kid*, 5 How. Pr. 242; *Osborn v. Betts*, 8 How. Pr. 31.

⁴² *Mills v. Watson*, 45 N. Y. Super. 591.

⁴³ *Howe v. Muir*, 4 How. Pr. 252; *Osburn v. Betts*, 8 How. Pr. 31, *ante*; 16 How. Pr. 271. See 10 How. Pr. 93; 45 N. Y. Super. 423.

⁴⁴ *Kraushaar v. Meyer*, 72 N. Y. 602.

ance falls, as it is set aside as a part of the judgment.⁴⁵ When one judge, before whom trial has been had, shall have made an order awarding an extra allowance, that order is not reviewable on motion before another judge.⁴⁶ The order for the extra allowance is appealable to the general term ;⁴⁷ but the Court of Appeals cannot review that which is within the discretion of the court below.⁴⁸ The determination of the question as to whether an action should be regarded as difficult and extraordinary, involves so many considerations which are addressed to the discretion of the judge, that the appellate court rarely interferes.⁴⁹ ^b

The additional allowance under the New York Code is limited, and cannot exceed, in the aggregate, the sum of \$2,000.⁵⁰

The disbursements of the prevailing party entitled to costs are included in his bill. Disbursements include the legal fees of witnesses and referees and other officers; the reasonable compensation of commissioners taking depositions ; the legal fees for publication, where publication is directed, pursuant to law ; the legal fees paid for certi-

⁴⁵ *Hicks v. Waltermire*, 7 How. Pr. 370. See 4 Abb. Pr. 245; 11 How. Pr. 434; 4 Duer, 613.

⁴⁶ *Dresser v. Jennings*, 3 Abb. Pr. 240.

⁴⁷ *Clarke v. City of Rochester*, 29 How. Pr. 97. See 34 N. Y. 365; 3 Hun, 57.

⁴⁸ *People v. N. Y. C. R. R. Co.*, 29 N. Y. 418.

⁴⁹ *Morrison v. Agate*, 9 N. Y. Week. Dig. 286.

^b The following cases, decided under § section 3253, will be of interest: 47 Super. 364; 26 Hun, 344; 60 How. Pr. 237; 29 Hun, 248; 31 Id. 384, 397; 39 Id. 566; 65 How. Pr. 288; 61 Id. 161, 305; 66 Id. 242; 5 Brown Civ. Pro. 164; 8 Civ. Pro. 212, 431; 11 Id. 54; 3 How. N. S. 22; 99 N. Y. 270.

⁵⁰ N. Y. Code Civ. Pro. § 3254; 26 Hun, 87; 31 Hun, 10; 13 Abb. N. C. 200; 4 Brown C. P. 305; 18 N. Y. Week. Dig. 20.

fied copies of necessary papers, recorded or filed in any public office, which papers are necessary to the party causing them to be brought into court ; the reasonable expenses of printing the papers for a hearing, when required to do so by a rule of the court ; the proper charges as allowed by law for the service of papers, together with the prospective charges of entering and docketing the judgment ; and the sheriff's fees for receiving and returning one execution, including a search for property, together with such other necessary and reasonable expenses, as are taxable, according to the course, rules and practice of the court, or that are allowed by express provision of law.⁵¹ It may be stated, as a general rule, that disbursements follow costs ; and where a party is not allowed his costs in the action, he cannot recover his disbursements.⁵² Witness fees should be taxed, as witnesses are entitled to the fees allowed to them by law.⁵³

Where opposition is made, on taxation, to the amount of the referee's fees, his charges should be supported by affidavit. The general affidavit of disbursements in such cases is not sufficient ; neither is the referee's certificate as to the number of days spent by him in examining the case after its submission. The affidavit should show the number of days spent by the referee before the submission of the case to him, and the number of days spent after the submission of the case in his examination, and that the

⁵¹ N. Y. Code Civ. Pro. § 3256; 11 Abb. N. C. 217; 2 Civ. Pro. 390; 3 Id. 80; 9 Id. 421; 10 Id. 160; 10 Daly, 420; 24 Hun, 173; 31 Id. 609.

⁵² *Rust v. Hansett*, 2 Law Bul. 6; *Wheeler v. Westgate*, 4 How. Pr. 269; *Peet v. Warth*, 1 Bosw. 653.

⁵³ *Wheeler v. Lozee*, 12 How. Pr. 446. See 18 How. Pr. 168; 25 How. Pr. 340; 5 Abb. Pr. 227.

number of days so spent by him was necessary for the proper examination, and his decision.⁵⁴ The usual expense of printing,—that is, necessary printing matter in the case,—may be taxed without regard to the price actually paid therefor.⁵⁵

Stenographer's fees are taxable as disbursements.⁵⁶ This is true, where the rules of the court, in the district in which the case is tried, allow the taxation of stenographer's fees; and the Code provides the amount of compensation that shall be paid to the stenographer.⁵⁷ The expense of a copy of the stenographer's minutes, taken upon a former trial and obtained for use on a new trial, is not taxable, and cannot form a part of the costs.⁵⁸

If the defendants, or a portion of the defendants, have no interest in the land, the plaintiff is entitled to his costs, though he may recover less than he demanded in his prayer for relief.⁵⁹ Where a defendant contests the plaintiff's right to partition down to the time of the entry of the interlocutory judgment, and the interlocutory judgment is finally entered in plaintiff's favor, the defendant then abandoning the contest, or contesting the plaintiff's right no longer, he will be liable to costs to the time of the withdrawing of his opposition.⁶⁰ If the issue determined be an issue of law only, costs may be allowed.⁶¹ It is not necessary to show, in the judgment for costs,

⁵⁴ *Brown v. Windmuller*, 36 N. Y. Super. 75; 14 Abb. Pr. N. S. 359; 53 N. Y. 642. See N. Y. Code Civ. Pro. § 3296.

⁵⁵ 54 How. Pr. 62. See 56 Id. 89; 45 N. Y. Super. 587.

⁵⁶ *Shultz v. Whitney*, 9 Abb. Pr. 71; 17 How. Pr. 471.

⁵⁷ N. Y. Code Civ. Pro. § 3311.

⁵⁸ *Flood v. Moore*, 2 Abb. N. C. 91.

⁵⁹ *Thornton v. York Bank*, 45 Me. 158.

⁶⁰ *Fiske v. Keene*, 46 Me. 225.

⁶¹ *Symonds v. Kimball*, 3 Mass. 299; *Swett v. Bussey*, 12 Mass.

that the petitioner or plaintiff has paid the costs of the action.⁶² In case a division is made of only a portion of land, and the remainder, not being susceptible of division, is sold, the costs of the proceeding, including the sale, must be borne equally by all the co-tenants.⁶³ The widow entitled to dower, and necessarily made a party to the action, is liable for her share of the costs, and judgment may be taken accordingly.⁶⁴ When partition is decreed, the costs are to be taxed as between the complainant and the defendants who have appeared as between party and party, and the aggregate amount of the several bills of costs, as taxed, is to be apportioned between the complainant and the other parties, according to their respective rights and interests in the premises, which aggregate amount is apportioned as ascertained and settled by the decree, which decree should direct that the several parties entitled to such costs should have execution therefor, according to the rules and practice of the court in such cases.⁶⁵

The defendant, in an action brought in an court of record in the State of New York, may require security for costs to be given in case the plaintiff is a non-resident, or a foreign corporation, or a person imprisoned under execution for a crime, or an official assignee of a person so imprisoned, or an official assignee, or official trustee of a debtor, or an assignee in bankruptcy where the action is brought upon a cause of action arising before the

⁶² *Sprott v. Reid*, 3 Iowa, 489.

⁶³ *Cooper v. Garesche*, 21 Mass. 151. See 1 *McCord*, 162; 17 *Md.* 231.

⁶⁴ *Tanner v. Niles*, 1 Barb. 560, *ante*.

⁶⁵ *Tibbits v. Tibbits*, 7 *Paige*, 204, *ante*.

assignment, the appointment of the trustee, or the adjudication in bankruptcy. The defendant may also require that a defendant, whose guardian *ad litem* has not given the security provided by law, shall give such security.⁶⁶

The costs should be paid as soon as they are ascertained, and no demand is necessary before proceedings may be had for their collection. An execution can be issued at once, and collection will be made by virtue of the execution.⁶⁷ In case the decree of the court direct that the land sought to be partitioned should be sold, and that the costs of the action should be paid out of the proceeds of such sale, then the payment of the costs would not be expected as soon as the judgment therefor was entered, but would be expected and should be paid as soon as the sale is sufficiently complete for that purpose.⁶⁸ The court may enforce the payment of costs, and may direct an attachment for that purpose. The costs of an adjournment of the trial may be charged and decreed against one making the application for the adjournment; and the court, or referee to whom such application is made, may make such direction, and that the costs should be paid to the adverse party, usually of a sum not exceeding \$10, together with the necessary fees of the witnesses of the adverse party; that is, such fees would be taxable as disbursements that had

⁶⁶ N. Y. Code Civ. Pro. § 3268; 2 Abb. N. C. 432; 4 Bosw. 663; 3 Johns. Ch. 520; 1 Duer, 705; 12 N. Y. Leg. Obs. 28; 8 Abb. Pr. 340; 8 Hun, 520; 7 Daly, 258; 22 How. Pr. 444; 1 Law Bull. 29; 17 N.Y. Week. Dig. 207; 63 How. Pr. 377; 53 Super. 530; 6 Civ. Pro. 371; 7 Id. 200; 8 Id. 138; 1 How. Pr. N. S. 146.

⁶⁷ Jackson *v.* Pell, 19 Johns. 270.

⁶⁸ Fulton *v.* Brunk, 18 Wend. 509.

been made in good faith by the party opposed to the adjournment, and the payment thereof may be required, as a condition for the granting of the adjournment. ⁶⁹

⁶⁹ N. Y. Code Civ. Pro. § 3255. See 43 How. Pr. 375; 18 Wend. 509; 5 Hill, 516; 19 Johns. 270.

CHAPTER XXIV.

DISTRIBUTION OF PROCEEDS.

AFTER the sale shall have been had and confirmed, the necessary deed or deeds of conveyance having been given, and the money paid, the next step is to properly distribute the money to those to whom it belongs. The costs and expenses of the partition suit, including all the disbursements, shall be deducted from the sum received as proceeds, or so much thereof shall be deducted as shall be chargeable to the proceeds as the costs and disbursements of the action, and then the balance of the money must be awarded to the parties whose rights and interests have been sold, in proportion to those rights and interests. It may have been found upon the sale that some one or more of the shares had at the time of the sale a lien or liens resting upon it, in which case the sum that is chargeable upon such share or shares, by reason of such lien or liens, must be deducted from the shares and paid to the persons or individuals holding such liens, or else retained, subject to the order, and under the control of the court, for such equitable disposition thereof as the court may deem right in the premises. The remaining part of such share upon which was attached the lien or liens, as spoken of as aforesaid, after the payment of the lien thereon, must be paid by

the officer making the sale, to the party owning the share, or to his legal representatives, or else paid into court for the use or benefit of such party.¹ Where an undivided share of real estate was devised to a husband, in trust for his wife during her natural life, and at her death to her heirs forever, subject to a life estate to her husband after the death of the wife, the court held, on a partition, that the proceeds in such case must be brought into court.² In case the lands belong to the wife, who is an infant, and are sold under a decree in partition, the husband is not entitled to the proceeds, but the court will secure the fund for the use of the wife, until she becomes of age and consents to receive the same.²

The New York Code of Civil Procedure by sections 1534, 1535 and 1536 makes provision for the protection of the rights of an infant in the property sought to be partitioned or to be sold. In case the property is sold, and one or more of the co-tenants are infants, the share and portion of such infants in the proceeds of the sale will remain under the protection of the court at the time of and after the distribution of such proceeds; and the court will make its direction as to how the share of the infant shall be invested, and shall oversee and direct all

The proceeds of a sale, after deducting therefrom the costs and expenses chargeable against them, must be awarded to the parties whose rights and interests have been sold, in proportion thereto. The sum chargeable upon any share, to satisfy a lien thereon, must be paid to the creditor, or retained, subject to the order of the court: and the remainder, except as otherwise prescribed in this article, must be paid, by the officer making the sale, to the party owning the share, or his legal representatives, or into court for his use. N. Y. Code Civ. Pro. § 1580.

¹ *Noble v. Cromwell*, 26 Barb. 475. See 6 Abb. Pr. 59; 3 Abb. Ct. App. Dec. 382.

² *Sears v. Hyer*, 1 Paige, 484.

that may be done pertaining to the portion of the proceeds belonging to those who are in their minority.³ At common law, the courts will not allow an infant, either separately or jointly with adult co-tenants, to maintain an action in partition. The first statutes of partition enacted by the State government allow infants to join with one or more adult co-tenants in common in a suit for partition.⁴ Afterwards, the New York Revised Statutes in the form in which we find them at the time of the enactment of the present Code, became the law, and by those statutes one or more co-tenants in common or joint tenants might bring an action of partition, providing they were of full age; but in the present Code the words "full age" seem to have been left out of the enactment, leaving to infants the right to bring an action of partition, providing it is proper for them to do so and the court can see the wisdom of such action. To do this, it is necessary for the infant to have proper authority for so doing, as provided by section 1534 of the New York Code and referred to in a previous chapter in this work. Infancy being a disability so far as the right of action is concerned, when the action is allowed by the proper court having authority to do so, it becomes the duty of the court in which the action is brought to protect the interest of the infant in all things pertaining to his action from its commencement until the proper and safe disposition of that portion of the proceeds has been made belonging to the infant; and in case an infant is a defendant, it is the bounden duty of the court to throw its protection around that portion of the proceeds belonging to such

³ Postley *v.* Kain, 4 Sandf. Ch. 542. See 1 Sandf. Ch. 201; 2 Hoffm. Ch. 161; 1 R. L. 507; 1 Paige, 483.

⁴ See act of March 15, 1785; 1 Greenl. Laws of New York, 165.

infant defendant, and to see that a proper disposition is made of it, so that, when its owner arrives at full age, and becomes entitled to it, he then can receive that which belongs to him.

The share of the proceeds of a sale in partition belonging to a wife will not be paid to the husband, unless a master certifies that on a private examination of the wife, he fully explained to her the nature and extent of her rights, and that she voluntarily consented to relinquish them in favor of her husband, either absolutely or on the terms and conditions specified in the master's certificate. Such consent, upon the part of the wife, should be given before some officer entitled to take acknowledgments. The rule laid down is that the acknowledgment and consent of the wife should be taken before one of the masters or judges of the court in which the action was tried ; that he by reason of his knowledge of the facts was more competent to understand the nature and extent of the wife's equitable right, and more competent to explain such right to her, so that she might fully understand what she was doing in relinquishing to her husband her right in the proceeds of the sale.⁵ In equity, it is not deemed a necessity that a partition should be made so as to give each party a share in every part of the property. Each party must have his or her share in value, and this is all that is required.⁶ To make an equitable distribution, one of the parties, by reason of advancements which he may have had, may be compelled to pay into the common fund, or pay money on his share to those who have not received as much by reason of not receiving advances. Lapse of time will not

⁵ Hallenbeck *v.* Bradt, 2 Paige, 316

⁶ Brookfield *v.* Williams, 1 Green Ch: 341.

raise the presumption of partition of lands, so as to bar the claims of minors, unless there is some evidence that there had been a division.⁷ Substantial improvements made by one of the defendants, who was in possession, and reasonable expenses paid by him in defending the title, may be taken into account.⁸

The deed of a married woman to a guardian of her infant husband is looked upon with jealousy, and the court require a personal examination of the wife to know if it be done with coercion. Equity will not recognize the wife's transfer to her husband of her share of the proceeds of a sale in partition, unless satisfied by her examination that the deed is her free and voluntary act. It is not claimed that the wife cannot make the transfer, and could not under the rules of the chancery courts, but that transfer must be her own individual and voluntary act, and the court must be satisfied that she was not compelled to make the transfer or that she did make the transfer by reason of any fear which she may have had of her husband.⁹ Provision may be made for the satisfaction of an inchoate right of dower by paying into court a gross sum fixed by the court as being the present value of the right of dower. The sum so fixed, as being the value of the wife's inchoate right of dower, is her personal property. Upon the wife's death it goes to her husband.¹⁰

If the decree in an action of partition and sale of real property recognizes and protects remainders therein, the interests of the remaindermen are cut off, even if the court erred in the practice as to the manner of protecting such

⁷ *Hclt v. Robertson*, 1 *Mullen Eq.* 475.

⁸ *Hitchcock v. Skinner*, Hoffm. Ch. 21.

⁹ *Ferris v. Brush*, 1 *Edw. Ch.* 571. See 1 *Clarke*, 540.

¹⁰ *Bartlett v. Janeway*, 4 *Sandf. Ch.* 396.

remainders. Such error would be only an irregularity and would not affect the validity of the decree.¹¹ The court will not make an order for payment to trustees of money produced by a sale under the Partition Act, where such money has been paid into court, and some of the persons interested are married women, and not residents of this country.¹² The English courts have gone so far as to hold, where the party to a suit for partition consented before her marriage to a decree for the sale, but before the sale died intestate, leaving her husband surviving, who took out letters of administration upon her estate, that she had elected in her life time to have her property converted, and that her husband was entitled to her share of the proceeds as personal estate.¹³ When, in an administration suit asking also for partition of real estate, the court directed a sale, but before it was effected one of the parties interested in the real estate died, the court held that the law was that the estate was sufficiently converted, and the estate having been sold, the share of the deceased beneficiary passes to his legal representatives.¹⁴ The rule is different in regard to the sale of infants' real estate in partition. The sale of infants' real estate under a decree in partition does not work a conversion.¹⁵

¹¹ *Rockwell v. Decker*, 5 Civ. Pro. 62. See N. Y. Code Civ. Pro. §§ 1569, 1570, 1580; 21 Alb. Law J. 435; 70 N. Y. 138, 517; 80 Id. 321; 65 Barb. 583.

¹² *Aston v. Meredith*, 13 L. R. Eq. 492; 26 L. T. N. S. 281.

¹³ *Fowler v. Scott*, 25 L. T. N. S. 23; 19 W. R. 972.

¹⁴ *Arnold v. Dixon*, 19 L. R. Eq. 113; 23 W. R. 314. See *Steed v. Preece*, 18 L. R. Eq. 192; 43 L. R. Ch. Div. 687; 22 W. R. 432.

¹⁵ *Foster v. Foster*, 1 L. R. Ch. Div. 588; 45 L. J. Ch. Div. 301. See 6 L. R. Ch. Div. 553; 11 Id. 652; 41 L. T. N. S. 670; 44 Id. 334; 5 Id. 585; 30 W. R. 286; 51 L. J. Ch. Div. 480; 10 Jacob's Fisher's Dig. 15758, 15759.

Where a party to an action for partition, entitled to receive a portion of the proceeds, is an infant, the court may, in its discretion, direct that the share of such proceeds going to such infant, shall be paid to his general guardian, or else direct that it be invested in permanent safe securities, on interest, in the name and for the benefit of the infant to whom it belongs.^b The shares of infant defendants in the proceeds of the sale of premises in a partition suit ought not to be paid to their guardians *ad litem*, but should be brought into court, and invested for the benefit of such infants. The rule laid down by the chancellor in a case just cited differs somewhat from the rule as laid down by section 1581 of the New York Code, which allows the court, in its discretion, to direct that the minor's share of the proceeds be paid to his general guardian. The law does not allow successive disabilities in different persons taking the same estate by devise or descent from each other.¹⁶

The parties before the court after the sale may have a variety of interests. It is for the court, in considering the interests of those parties, to make an equitable distribution of the proceeds *pro rata*, in accordance with the interests of the parties that are before the court. The court must then pass upon the validity of the liens that may be attached to any portion of the proceeds, and direct payment thereon in proportion to the rights of the lienholder as to the money to which the lien is attached;

^b Where a party, entitled to receive a portion of the proceeds, is an infant, the court may in its discretion, direct it to be paid to his general guardian, or to be invested in permanent securities, at interest, in the name and for the benefit of the infant. N. Y. Code Civ. Pro. § 1581.

¹⁶ *Doe v. Jesson*, 6 East, 80; 2 Preston on Abs. 341; 1 Paige, 483.

that is, if the lien is attached to the whole of the proceeds, then it must be paid from the whole of the proceeds, providing there be sufficient to do so. If the lien is attached to the share of any co-tenant in the proceeds, then that share, or so much thereof as may be necessary, must be used in the payment of that lien. "The statutes of the various States whose courts have been authorized to sell lands in suits for partition, contain provisions designed to assist and control the distribution of the proceeds of the sale."¹⁷ The share of a lunatic co-tenant is entitled to the same protection as an infant co-tenant. When married women are parties, either as co-tenants or as the wives of co-tenants, the proceeds of the sale, in which they have an interest, are not, as a general thing, paid to their husbands, unless the wives shall have consented to such payment, by some instrument in writing, executed and acknowledged in the same manner as instruments releasing their right of dower in the premises, or in the same manner as instruments made and executed and acknowledged by them for the purpose of conveying their individual property, unless the statute allows the husband by giving security to indemnify the wives for any loss that may be occasioned by reason of the moneys belonging to his wife, and being her interest in the proceeds of the sale having been paid to him. If the husband does not give such security, when allowed to do so by the statute, or, if the wife does not consent to allow the husband to receive the money, if it is an inchoate right of dower, it may be invested under the direction of the court for the benefit of the wife. If the wife be a co-tenant, the money may be paid to her, and, under the

¹⁷ Freeman on Co-tenancy, § 549, p. 726.

present practice and general view of the law in America, the money should be paid to her the same as if she were a single woman, providing she be of full age.¹⁸ When some of the co-tenants have made conveyances *pendente lite*, their grantees, if practicable, will be allowed to share in the proceeds of the sale, and they will share according to the priority in the time of which they received their several conveyances. Where land, of which one undivided share is held in fee, and the other undivided share in co-tenancy for life and in remainder, is conveyed in parcels, by successive deeds, to different persons, the latter conveyance expressly referring to the former and being subject thereto, the court, on making partition between owners of the undivided interests, should give effect to the earliest conveyances in preference to the latter. The principle of partition is the same where a sale is necessary, as where actual partition is made; and the rights of the parties in the proceeds of the sale are the same as in the lands themselves. Where the equities of the case give some of the parties an interest in specific parcels, they are entitled to have the actual value of such parcels ascertained; and a judgment directing that the value of the parcels assigned on account of such equities, shall be estimated at the same rate as the other parcels bring upon a sale, is an error, unless it appears by the record that it did not work injustice.¹⁹ In South Carolina, the proceeds are treated as land, and an exemption under the homestead law may be retained in that State.²⁰

¹⁸ See C. C. P. of Cal. 773-791; Id. Colo. §§ 299-300; Laws of Nev. §§ 1345-1372; C. C. P. N. Y. §§ 1564-1580; Laws of Oregon, 1 Deady, 258-264.

¹⁹ Warfield *v.* Crane, 4 Abb. Ct. App. 525.

²⁰ Norton *v.* Bradham, 21 S. C. 375.

Orders made by the court pertaining to the investments of the funds, do not in any way affect the purchasers of the property, unless they shall have had notice thereof.²¹

In case one is made defendant as an unknown person, or the name of a defendant is unknown, or in case a defendant shall be a non-resident, and the summons shall have been served upon him by publication, or has been served upon him under the rules of practice, known as a service "without the State," and has not appeared in the action, the court is bound to direct that the portion belonging to such defendant be invested in permanent securities, at interest, for the benefit of such defendant, until the same shall be claimed by him or by his legal representatives.²² The Revised Statutes of New York provide, "Where any of the parties whose interests have been sold, are absent from the State, without legal representatives in this State, or are not known or named in the proceedings, the court shall direct the shares of such parties to be invested in permanent securities, at interest, for the benefit of such parties, until claimed by them or their legal representatives."²³ "Where the proceeds of a sale belonging to any tenant in dower, or by the courtesy, or for life, shall be brought into court, as hereinbefore directed, the court shall direct the same to be invested in permanent securities, at interest, so that such interest shall annually be paid to the parties entitled to such estates, during their lives respectively."²⁴ Where the proceeds, representing an undivided share or interest, are invested pursuant to the order of the court for the benefit

²¹ *Beery v. Irich*, 22 Gratt. 614.

²² See N. Y. Code Civ. Pro. § 1582.

²³ 3 N. Y. R. S. 6 ed. 594, § 79.

²⁴ 3 N. Y. R. S. 6 ed. 594, § 80. See 16 Barb. 531; 1 R. L. 510,

of a tenant for life, or for years, and for the benefit of a widow, as directed by the New York Code, it is the duty of the court to cause such investments to be made in permanent securities, at interest, and the interest as paid from time to time, as it becomes due, shall be paid to the person for whose benefit it is invested, while his or her right or estate continues in the fund.^a In case there shall be a doubt arising in regard to the ownership of the funds, it is within the discretion of the court to compel the persons receiving such moneys arising from the sale as aforesaid, to give security to the satisfaction of the court, to refund the share of the money, with interest thereon, received by the person so receiving it, in case it shall afterwards appear that such party was not entitled to the money so paid to him under the decree of the court.²⁵ It is within the discretion of the court whether it requires the parties to the action receiving the money, as his or her portion of the proceeds of the sale, to give such security or not; but the court may require such security when the justice of the case would indicate that it is its duty to do so for the protection of the funds.^e The Revised Statutes

^a Where a portion of the proceeds, representing an undivided share or interest, is invested for the benefit of a tenant for life, or for years, or of a widow, as prescribed in the foregoing provisions of this article, the court must cause it to be invested in permanent securities, at interest, and the interest to be paid, from time to time, as it accrues, to the person for whose benefit it is invested, while his or her right continues. N. Y. Code Civ. Pro. § 1583.

²⁵ 3 N. Y. R. S. 594, § 81.

^e The court may, in its discretion, require any person, before he receives his portion of the proceeds of the sale, to give such security as it directs, to the people, or to such parties or other persons as it prescribes, to refund the same, or a portion thereof, with interest, if it thereafter appears he was not entitled thereto. N. Y. Code Civ. Pro. § 1584.

provided that security directed to be taken by a court, or any investment to be made, or any security to be taken by the commissioners on the sale of the real estate, excepting where the provisions of the law otherwise direct, such security and the bonds, mortgages, or other evidences of debt, should be taken in the name of the clerk of the court in which the action is tried, and his successor in office, who should hold the same by virtue of their respective offices, and deliver them to their successors. The clerk of the court was entitled to, and it was his duty to receive the interest and the principal, when the same became due, and to apply the same, or to reinvest it, as the circumstances of the case may require, and within the decree of the court, directing the investment.²⁶ Where moneys deposited in the court, in a suit for the partition of lands, have been invested by the clerk upon bond and mortgage executed to him in his official character, such clerk has no power to discharge the mortgage without the order of the court. Such discharge may be, although unauthorized, ratified by the owner of the fund secured by the mortgage, because the act of a public officer exceeding the authority conferred on him by law may be adopted by the party for whose benefit it is done.²⁷ The rule that the act of the public officer exceeding the authority that is conferred upon him by law may be adopted by the party for whose benefit it is done, extends

²⁶ 3 N. Y. R. S. p. 594, §§ 82, 83. See 16 Barb. 534.

²⁷ Farmers' Loan & Trust Co. *v.* Walworth, 1 N. Y. 433; Frothingham *v.* Haley, 3 Mass. 70; Foster *v.* Bates, 7 Lon. Jur. 1093. See 1 American Lead. Cas. 421; 15 Pick. 225; Hampshire *v.* Franklin, 16 Mass. 76; Zeno *v.* Williams, 9 Lou. 58; Planters Bank *v.* Sharpe, 4 Smedes & M. 75; Church *v.* Sterling, 16 Conn. 899; Ruggles *v.* Washington Co., 3 Miss. 495.

to the entire act of the agent or person professing to act as such.²⁸ ^f

The present Code of New York directs that the security provided for under any provision of the article upon partition, shall be taken in the name and official title of the county treasurer of the county in which the property is sold, and that he, and his successors in office, must hold the same for the use and benefit of the persons interested, subject to the order of the court.^g This section is similar to the Revised Statutes, section 82, above referred to, excepting the name of the county treasurer is substituted for the clerk. It is a general rule in New York State that money paid into court, unless the court otherwise specially directs, must be paid by the officer who is required by law first to receive it, to the county treasurer of the county where the action is triable. This payment should be made to the county treasurer within four days after it is received by the official required to receive it. If this money is invested, the bonds or mortgages or other evidences of investment and securities must be

²⁸ Cushman *v.* Loker, 2 Mass. 106; Newell *v.* Hulbert, 2 Vt. 351.

^f Upon the question that the statutes are prohibitory upon the clerk, see 14 Johns. 273; 8 Paige, 527; 7 Wend. 152. As to who must bear the consequences of the error, see 1 Story Eq. 399; 1 Cow. 622; 7 Paige, 421; 9 Id. 317; 4 Johns. Ch. 46; 1 Paige, 461; 5 Price, 306. In relation to the unauthorized acts of trustees, see Story Eq. 12, 62; 1 Johns. Ch. 581; 2 Id. 441; Hill on Trustees, 525.

^g A security taken under any provision of this article, except as otherwise specially prescribed therein, must be taken in the name and official title of the county treasurer of the county in which the property is situated. He, and his successors in office, must hold the same for the use and benefit of the persons interested, subject to the order of the court. N. Y. Code Civ. Pro. § 1585.

taken in the name of the county treasurer of the county.²⁹ The court may, in its discretion, allow a party interested in the funds so invested in the name of the county treasurer to bring and maintain an action thereon in the name of the county treasurer, in whose name such investment is made.³⁰ The Revised Statutes of New York contain a provision against abatement of the action by the death or change of office in the county treasurer, although the Revised Statutes contemplate the action being brought in the name of the clerk in whose name the investment had been made. It provides that no suit shall be abated "by the death," removal from office or resignation of the clerk to whom such evidences were executed, or of any of his successors.³⁰ By this it seems that the action may be maintained in the name of the county treasurer in whose name the investment was made, or in the name of any of his successors in office.

The State of Pennsylvania has, by its law, what is known as a collateral inheritance tax on estates in remainder. This tax accrues immediately upon the death of the decedent from whom the remaindermen acquire title. The time when the tax accrues is not changed by law. The limitation, provided by the act of 1855, that all such taxes, not sued for within twenty years after they accrue, are presumed to be paid and cease to be a lien as against purchasers, begins to run, therefore, from the death of the decedent, and not from the death of the

²⁹ The court may, in its discretion, and upon such terms and conditions as justice requires, make an order, allowing a person interested in a security specified in the last section, to maintain an action thereupon in the name of the county treasurer. N. Y. Code Civ. Pro. § 1586.

³⁰ N. Y. Civ. Code Pro. § 745; 2 R. S. 171, 172; 4 Edm. 575.

³⁰ N. Y. R. S. p. 594, § 85.

owner of the intervening estate. The action of partition of lands, charged with the lien of collateral inheritance tax, will not apportion the lien of the tax.³¹

When the question of advancements is involved in a partition suit, and it is found that more had been advanced to the defendant than to the plaintiff, and the plaintiff was awarded the difference, to be first paid out of the proceeds of the sale of the property, the residue to be equally divided between the parties, and after the appeal, the defendant received and retained the share of the proceeds awarded to him by the court, the Court of Appeals of New York held, that the subject matter of the appeal was not so distinct from the fund out of which defendant had received a share, that the amount receivable by him could not be affected thereby, and that, therefore, the defendant must be deemed to have waived the right to prosecute his appeal, and it should be dismissed.³² Such acceptance was inconsistent with the appeal.³³

³¹ *Beatty v. Commonwealth of Pennsylvania*, 5 Cent. R. 841; Acts of March 11, 1850, and May 4, 1855; 19 Pa. 15; 41 Id. 60; 42 Id. 192; 53 Id. 102; 10 La. Ann. 392; 72 Pa. 199.

³² *Alexander v. Alexander*, 6 Cent. R. 38.

³³ *Knapp v. Brown*, 45 N. Y. 207; *Murphy v. Spaulding*, 46 N. Y. 556; *Barker v. White*, 58 N. Y. 211; *Genet v. Davenport*, 59 N. Y. 648; *Ehrichs v. De Mill*, 75 N. Y. 370; *Guernsey v. Mill*, 80 N. Y. 181. *Contra*, *Jaynes v. Jaynes*, 8 Civ. Pro. R. 94; *Benkard v. Babcock*, 27 How. Pr. 391; *People v. Supervisors*, 58 Barb. 139.

CHAPTER XXV.

EQUALITY OF PARTITION AND ADJUSTMENTS OF RENTS.

THE New York Revised Statutes made provision that "whenever partition shall be decreed by a court of equity, if it shall appear that it cannot be made equal between the parties, without prejudice to the rights and interests of some of them, the court may decree compensation to be made by one to the other, for equality of partition according to the equity in the case."¹ The New York Code of Civil Procedure makes provision for compensation for the purpose of making an equality of partition.²

It is not necessary that the shares assigned to the several parties should be exactly equal ; as the parties who receive more than their share of the estate may be required to make a pecuniary compensation to those who received less, it being the duty of the court to take this into consideration, and to take into consideration that it

¹ 3 N. Y. R. S. 596, § 97; 1 R. L. 514 §§ 16, 17; 1 Barb. 506.

² Where it appears that partition cannot be made equal between the parties, according to their respective rights, without prejudice to the rights or interests of some of them, the final judgment may award compensation to be made by one party to another for equality of partition. But compensation cannot be so awarded against a party who is unknown or whose name is unknown. Nor can it be awarded against an infant, unless it appears, that he has personal property sufficient to pay it, and that his interest will be promoted thereby. N. Y. Code Civ. Pro. § 1587.

may be impossible to so divide the land that each parcel should exactly correspond in value to each of the other parcels.² The commissioners may assign a portion of the premises held in common, to one of the parties, charged with a servitude, or easement, for the benefit of another party, to whom a distinct portion of the premises is assigned in severalty.³

In the case of *Hill v. Dey*, 14 Wend. 204, cited by the chancellor in his opinion in *Smith v. Smith*, 10 Paige, 470, it appeared that the commissioners in partition had set off to one of the parties one part of the premises, by metes and bounds, and another part of the premises to the other in the same way, the whole embracing two mills upon the same stream; the one below the other. The commissioners, in their report, in addition to the land itself on which the lower mill was located, had given to the party to whom that part of the land was set off, the easement or right to flow back the water upon the land assigned to the other, in the same manner and to the same extent that such water had been flowed back previous to the partition. Notwithstanding that the question there arose upon the construction of the report of the commissioners, the court recognizes the principle that the commissioners might assign one part of the premises to a party, charged with a servitude, or easement, for the benefit of another party, to whom a distinct portion of the land was assigned by metes and bounds, and could so make its decree that equitable partition could be had between the parties.⁴ Partition can be had of a mere equitable estate.

² *Larkin v. Mann*, 2 Paige, 27, *ante*.

³ *Smith v. Smith*, 10 Paige, 470, *ante*; citing 14 Wend. 204.

⁴ *Morrill v. Morrill*, 5 N. H. 134, *ante*; *Warren v. Baynes*, 2 Blunt Amb. 589; 1 Peere Wms. 446.

A tenant in common, in possession, will be allowed for substantial and useful improvements, but not for such improvements as are merely ornamental. The reason why a tenant in common will be allowed for improvements,—that is, necessary and substantial improvements,—is because the possession of one tenant in common is the possession of that of his co-tenants.⁵ The court can properly render a judgment declaring the rights of the parties, and directing that partition should be made; and also providing for an account between the parties in respect to the matters pertaining to the estate, and in respect to the rents and profits already received.⁶ If there is inequality of value between one portion that cannot be divided, and another portion that can be, the commissioners may make such allotment of parcels as will produce equality by awarding proper compensation in money.⁷ The court will not set aside a report requiring a payment to equalize, unless the power has been abused or so exercised as to operate unjustly.

The property of a lunatic is at all times under the control of the court, even though the property may be in the hands of a committee, as the committee is an officer appointed by the court and subject to the rules of the court which appointed him, and in case an idiot or a lunatic co-tenant injures the property held in common by pulling down buildings or demolishing necessary improvements, the court is authorized to make equitable partition of the land upon proper petition, and to compensate those

⁵ *Hitchcock v. Skinner*, Hoffm. Ch. 21, *ante*; *Cartwright v. Pulteney*, 2 Atk. 380; *Cose v. Smith*, 4 Johns. Ch. 271; *Turner v. Morgan*, 8 Vesey, 145.

⁶ *Brownson v. Gifford*, 8 How. 389.

⁷ *Walker v. Walker*, 3 Abb. N. C. 12, *ante*.

who have been injured by reason of the act of the idiot or lunatic. Where an idiot who was under the care of a committee appointed by the court, pulled down a school-house standing upon lands owned by him and the trustees of the school-district, the court authorized an equitable partition of the land, so as to compensate the trustees for the share of the school-house which belonged to them.⁸

It might be claimed that idiocy or lunacy was a defense, but, if in such case it should be a defense, the court could not do justice and equity to the parties interested in the premises. Idiocy and lunacy would be defenses, if established, against the charge that the person who had demolished it had by so doing committed a crime, but it would be no reason why courts in making a division of the property between the co-tenants should not do equity by compensating those who had been injured by reason of the act of the one who was deprived of his understanding. The parties are in court for the purpose of having an equitable division of their property made, and while it is the duty of the court to protect the property of the one who is disabled by reason of lunacy or idiocy, it is also the duty of the court to do exact justice in the case, and the plaintiff must come into court for justice and nothing else.⁹ The court would have power to order a sale of an idiot's or lunatic's real estate for the payment of his debts. This law is one that has been well established for many years. If the idiot or lunatic injured the property by an act which if in his right mind would have been criminal or a wrongful act, he creates a debt to his fellow co-tenant for which he is liable; and the court controlling the

⁸ Matter of Heller, 3 Paige, 199. See 7 Paige, 315.

⁹ 1 Jac. & Walk. 636; 5 Mad. 406, 1 Hogan, 98.

property will compel the payment of that debt in a partition suit by an equitable distribution of the property or its proceeds in case of a sale.

Where one of several co-tenants, who is in possession of the premises held in common, claiming title to the whole, sells and conveys the same to a third person, who enters under that conveyance claiming title to the whole, it is such an ouster of the other tenants in common as to bar their right of entry after an adverse possession of twenty years. Where, in such case, the purchaser, being in possession and supposing himself legally entitled to the whole of the premises, makes valuable improvements thereto by erecting valuable buildings thereon, he will be entitled to an equitable partition of the premises, so as to give him the benefit of the improvements made by him in good faith at the time he supposed he was the owner thereof.¹⁰ Where one tenant in common makes improvements on the land, a court of equity, in making partition, will decree an account and compensation, or else assign to him that part of the premises on which the improvements have been made; and it is not necessary to show the assent of his co-tenants, nor a request or refusal to join in the improvements.¹¹ The statute of limitations has no application to an equitable claim, on a partition, by one tenant in common, for compensation for his improvements. Where one, supposing that he owns the whole of the land, and has the only record title thereto, in good faith improves part of the land and makes mortgages upon it, and sells a portion of it, if afterward it should turn out

¹⁰ *Town v. Needham*, 3 Paige, 545; citing 4 Mass. 327; 5 Pet. 402; 13 Johns. 406; 9 Cow. 530; 2 Paige, 54; 1 Johns. Ch. 354; 6 Durn. & E. 556.

¹¹ *Green v. Putnam*, 1 Barb. 500, *ante*.

that the legal estate in a portion of it is in other persons, and that he is a tenant in common with those other persons, the court, on a bill for partition, would allow to him or to his grantees, the improved portion of the premises, and the mortgages made by him in good faith would be liens thereon.¹² Equity may direct a partition for the purpose of setting off one co-tenant's share, and decreeing a sale of the residue for the benefit of the other tenants, providing for compensation in case of inequality in the allotment of the land as divided and allotted between the respective co-tenants.¹³ The English law is similar to the American in reference to an equality of partition. Freehold and leasehold property belonging to two sisters, tenants in common, was settled upon their respective marriages in the usual way. An agreement was afterward come to by which the property was to be partitioned, and held in severalty on the trust of the two marriage settlements, a sum of money being paid for equality of partition. That sum was never paid, but interest was paid upon it. The parties entitled under each settlement took possession of the property allotted to them, and, as the result of larger expenditure upon the property which was originally the most valuable, its value increased to a greater extent than did that of the less valuable property. Children having been born of each marriage, an action for partition on the basis of the agreement was commenced. The court held, that in calculating the amount to be paid for equality of partition, one moiety of the difference between the present values of the

¹² *St. Felix v. Rankin*, 3 Edw. Ch. 323. See 4 Lea (Tenn.) 474; *Conklin v. Conklin*, 3 Sandf. Ch. 64; *Neeson v. Clarkson*, 4 Hare, 97.

¹³ *Haywood v. Judson*, 4 Barb. 228, *ante*.

properties should be taken, expenditures by both sides on permanent improvements having been first deducted.¹⁴ The court before whom the action is tried, is not restricted, as a court of law is, to a mere partition of the lands between the parties, according to their interest in the same, and having a regard to the true value thereof, but can make an equitable division of the property.¹⁵

Where, in a partition suit, actual partition cannot be made, and a sale is decreed, the question as to the distribution of the proceeds of the sale of any undivided share of the premises, between the owner and the incumbrancers, is collateral to the main purpose of the action ; the court, having jurisdiction of the fund, adjudges how distribution shall be made thereof. Where, in such case, in accordance with the practice of the court, an order of reference is granted directing the referee to ascertain and report the amount due to any party to the action who has any general or specific lien upon the premises, the referee is authorized to take proof and pass upon the question of the validity of a mortgage upon an undivided share, claimed by one of the parties, although the question is not raised by any formal issue in the pleadings.¹⁶ The general rule authorizing the court to adjust, by its decree, the equitable rights of every party to the action and to the fund, allows the court to adjust the validity of a mortgage, claimed to be a lien upon the share of any

¹⁴ *Watson v. Gass*, 51 L. J. Ch. Div. 480; 45 L. T. N. S. 583; 50 W. R. 286.

¹⁵ *Hibbard v. Dayton*, 32 Hun, 220; *Green v. Putnam*, 1 Barb. 509, *ante*.

¹⁶ *Halsted v. Halsted*, 55 N. Y. 442, *ante*. *Contra*, *Wright v. Delafield*, 25 N. Y. 266; *Garvey v. Jarvis*, 54 Barb. 179; *Bullwinker v. Ryker*, 12 Abb. Pr. 311.

co-tenant.¹⁷ The referee may determine the respective shares which each of the parties is entitled to receive, the amounts which certain parties in interest have received from the estate, but cannot charge interest upon such amounts received, as there are no legal grounds upon which it could be computed or charged. Upon an appeal from a judgment entered in accordance with the report of the referee reporting that interest should be charged, the appellate court may modify the final order by directing the shares of the appealing defendant to be ascertained by excluding therefrom the interest charges made and contained in the referee's report, against the amounts received by each of the persons interested in the estate. The shares of the co-tenants who have received advancements or money from the estate, should be allotted to them, less such advancements or money received, exclusive of interest thereon.¹⁸ The defendants have the right to bring to the notice of the court, before the awarding of partition, any advancements made by the ancestor to any of the heirs; and such advancements, when their amount has been ascertained, must be taken into consideration by the court in specifying the shares to be assigned on partition.¹⁹

Partition under the statute is in the nature of a bill in equity.²⁰ In a petition for a partition, under the statute of New Hampshire, the committee has no authority, without the consent of the parties, to set off to one, more than

¹⁷ Willard Eq. 48; Story Eq. Jur. § 64; *Scott v. Guernsey*, 60 Barb. 178.

¹⁸ *Platt v. Platt*, 42 Hun, 592.

¹⁹ *Kepler v. Kepler*, 2 Carter, 363.

²⁰ *Nesmith v. Dinsmore*, 17 N. H. 515.

his just share of the estate, and then award, that he pay a sum of money to the others to make an equality.²¹

The committee may, and generally it should, receive such offers as may be made by the several owners, for a choice of the parcels into which the premises are divided.²² When it is impossible to divide an estate between tenants in common by assigning to each other his portion of the land,—that is, when the tenants in common refuse so to do,—the remedy is to resort to a court of equity, which has power to compel the sale of the entire estate, in case it cannot be partitioned and allotted, and order distribution of its proceeds upon an equitable basis.²³ The proceeds of the sale of one tract of land cannot be applied to payment of fees or costs in the partition of another tract of land.²⁴ To enable the court to make a decree of partition, the equitable rights of the parties should appear by the pleadings. Those rights should be set forth plainly and fully, so that the court may understand, at the commencement of the action, that which is claimed by the parties who are before it.²⁵

As between tenants in common, one ought not to profit by improvements made by another, or money advanced to save the estate, but should make fair equitable contribution. If a party receive the purchase money of the land sold, he affirms the sale, and he cannot claim

²¹ *Whitney v. Parker*, 1 N. Eng. 164.

²² *Timon v. Moran*, 54 N. H. 441.

²³ *Barney v. Leeds*, 54 N. H. 128. See 52 *Id.* 613.

²⁴ *Dale v. Dale*, 3 West. R. 264; citing 73 Mo. 590; 45 Mo. 106; 63 Mo. 258; 61 Mo. 221; 60 Mo. 105; 29 Mo. 13.

²⁵ *Cooter v. Dearborn*, 2 West. R. 399; *Hopkins v. Medley*, 97 Ill. 402; *Jessup v. Jessup*, 102 Ill. 480; *Wilton v. Tazwell*, 86 Ill. 29; *Maple v. Kussart*, 53 Penn. St. 348; *Stroble v. Smith*, 8 Watts, 280; *Brandon v. Brown*, 106 Ill. 527.

against it, whether the sale was void or voidable. The receiving of the money is an estoppel in the computation for improvements in partition proceedings. The co-tenant against whom the improvements are charged should not be charged with the price of the improvements, but only with his proportion of the amount, which, at the time of partition, the improvements add to the value of the premises, with a deduction of any sum to which he may have a just claim for the use and occupancy of his share by the co-tenant who made the improvements.²⁶ The plea of an infant made to the effect that his guardian had no power to convey the interest of his ward as an heir at law in real estate, without the order of the court, may be taken, and such infant co-tenant is not guilty of laches, if he fails to bring a suit for partition and to cancel the deed within three years after he shall arrive at his majority. The reason for this is, that the possession of one tenant in common is the possession of all.²⁷ When an infant brings his suit in partition, and to set aside a fraudulent deed, if he is not entitled to possession, but establishes that he is entitled to an equitable partition of the premises, compensation to such infant may be decreed.

The beneficiary in a deed of trust to secure the payment of a debt is a proper party to a suit for the partition of land. Where one who is entitled to a distributive share is dead, his administrator, in the regular course of proceedings, should be made a party to the suit. The administrator can be appointed at the instance of the heirs, or of the trustee named in the deed of trust, providing he was a creditor of the deceased distributee's

²⁶ *Rowan v. Reed*, 19 Ill. 28; *Freem. Coten.* § 510.

²⁷ *Dugan v. Follett*, 106 Ill. 588; *Ball v. Palmer*, 81 Ill. 370.

estate. In such a case, where, instead of pursuing this course, or making any such suggestions to the court, the trustee made the specific issue that he was entitled by contract to one-fourth of the proceeds realized at the sale of the trust estate, and the issue was fairly adjudged against him, he must abide the consequences. If he changes his demand to a claim for an indebtedness justly due to him, the court would be justified in taking into consideration such demand upon an equitable distribution of the property.²⁸

It is for the court to determine whether there shall be a partition or a sale of the property, and, whenever that determination is made, the rights and interests of all persons concerned in the property should be presented to the court, that an equitable provision may be made in reference to such rights. The inchoate right of dower of the wife of a co-tenant should be presented to the court in some way during the pendency of the partition suit. If it is not presented to the court, and a judgment of partition is taken, making no allowance or provision for such inchoate right of dower, such judgment is a bar to an action to recover dower thereafter. It is the general intent of the statutes, in reference to partition, to cut off the inchoate right of dower of any party to a partition suit, as a general rule ; and if the position is tenable, the claim for dower, being an adverse one accruing before the titles of the tenants in common, could not be determined in the partition suit, it should be presented in some form in that action ; and when the owner of such inchoate right fails to do this, she cannot, in another action, claim that she was unlawfully deprived of her dower.

²⁸ *Harbison v. Sanford*, 7 West. R. 733 ; citing 79 Mo. 555 ; 47 Id. 544, 76 ; 48 Id. 300 ; 1 Mo. R. S. § 4010.

right.²⁹ A purchaser on a partition, under the order of the court, is entitled to be protected even against error.³⁰

There is nothing contained in the partition act, as set forth in the New York Code of Civil Procedure, that prevents the court from adjusting, in its interlocutory or final judgment, the rents and profits of the premises.^b In the partition of lands, upon which there is a stone quarry, the co-tenant, who has had the possession of the quarry, is bound to account for the rent of the premises, providing he has rented them, and for the moneys received by him for stone sold from the quarry; and such use and rental of the premises may be set forth in the pleadings. Such accounting is upon an equitable basis, the rights of the party in possession of the stone quarry being taken into consideration.³¹ The co-tenant can be compelled to account for the cutting off and selling of timber on unimproved grounds,³² and for coal or minerals mined and sold by the co-tenant in possession.³³

²⁹ *Jordan v. Van Epps*, 85 N. Y. 427, *ante*; 4 *Paige*, 98; 3 *Id.* 342; 2 *Barb.* 398; 5 *Id.* 57; 46 N. Y. 182; 5 *Den.* 385; 6 *Abb. Pr.* 60; 15 N. Y. 617; 56 *Id.* 226; 58 *Id.* 176; *Freem. on Jud.* § 304; *Scribner on Dower*, 331; *Wright v. Dunning*, 46 Ill. 271; *Whittemore v. Shaw*, 8 N. H. 393; *Pentz v. Kuester*, 41 Mo. 447; *Hunt v. Hunt*, 72 N. Y. 218; *Searle v. Galbraith*, 73 Ill. 269; *Guthrie v. Lowry*, 84 Penn. St. 537; *Spaulding v. Baldwin*, 31 Ind. 376.

³⁰ *Holden v. Sackett*, 12 *Abb. Pr.* 473.

^b Nothing contained in this article prevents the court from adjusting, in the interlocutory or final judgment, or otherwise, as the case requires, the rights of one or more of the parties, as against any other party or parties, by reason of the receipt, by the latter, of more than his or their proper proportion of the rents or profits of a share, or part of a share. *N. Y. Code Civ. Pro.* § 1589.

³¹ *McCabe v. McCabe*, 18 Hun, 153.

³² *Elwell v. Burnsides*, 44 *Barb.* 447.

³³ *Job v. Potton*, L. R. 20 Eq. 84; *Coleman v. Coleman*, 1 *Parson Penn.* 470; *Curtis v. Coleman*, 22 *Grant*, 562.

The remedy by an action for rents, by one tenant in common against another, is cumulative, and does not bar the equitable adjustment of them on a partition in equity. The rents are a lien upon the shares or interests of any co-tenant from whom they may be had. Where rents are due from one tenant in common at the time of the death of another tenant in common, the administrator of the latter is a proper party to an action of partition, and he is entitled to receive the rents due his intestate at the time of his death.³⁴ Where a co-tenant who has not paid his share of the improvements seeks partition, the court will so make partition so as to allot to such co-tenant making the improvements the improved portion of the property.³⁵ Such improvements may be offset against the use and occupancy of the land, or against the rents received therefor, notwithstanding that the co-tenant in possession may have made improvements upon the land, he must account for the rents of the property so occupied by him.³⁶ A co-tenant in common receiving rents does not receive them for his co-tenants in a body, but each one's share for the person entitled thereto. In accounting for such rents and profits to such co-tenants, he is entitled for an allowance of such sums as he may have paid for taxes and assessments on the premises, or for keeping the same in ordinary repair. Upon the death of a tenant in common who has received more than his share of the rents and profits of the estate, the amount due to his co-tenant, which is personally charged, is payable out of the

³⁴ *Scott v. Guernsey*, 48 N. Y. 106, *ante*.

³⁵ *Louvalle v. Menard*, 1 Gilm. 39; *Haskins v. Spiller*, 1 Dana, 170.

³⁶ *Rasspass v. Breckinridge*, 2 A. K. Marsh. 581.

personal estate of the decedent.³⁷ The excess of rents received is a lien on the share of the one receiving it.³⁸

In an action for partition, the defendants, being in default, cannot be required to render an account for rents and profits, if the complaint does not specifically ask for such relief. This is true, notwithstanding the rent may be a lien upon the share of the co-tenant having benefit thereof, because he is entitled to notice by the pleadings that a demand shall be made against him for such rent; and the court, as a general rule, has no power to grant, against one in default, a greater relief than that asked for in the complaint.³⁹

When property is held in trust for the benefit and support of members of an association, no rights descend to the heirs of the members. Therefore, there can be no partition upon the part of one of the heirs of such an association. In 1817, a society called Separatists came from Germany to the United States. One of them purchased land in Ohio, for which he gave his bond, and took the title to himself. Afterwards, the society adopted laws governing itself, and in 1832 obtained an act of incorporation. The articles of the association contained a renunciation of individual property. One of the members, who signed the articles of association, died in 1827. Thereafter, one of his heirs began a partition suit of the property. No legal rights were vested in the members. The ancestor of the heir had renounced all right of individual property, when he signed the articles of association, and did so upon con-

³⁷ *Hall v. Fisher*, 20 Barb. 446; *Hannan v. Osborn*, 4 Paige, 336. See 6 Cow. 475; 1 Comyn. 87; 1 Salk. 250; 1 Peere Wms. 25; 2 Ver. 233; 6 Coke, 18; 1 Ves. Jun. 145.

³⁸ *Warfield v. Crane*, 4 Keyes, 448; *Brede v. Lathrop*, 32 N. Y. 535.

³⁹ *Bullwinker v. Ryker*, 12 Abb. Pr. 311, *ante*.

sideration that the society would support him in sickness and in health ; and this by him was deemed an ample consideration and compensation for his labor in the society and for his interest in the common property, or property contributed to the common stock. The court has no legal objection to such association or partnership, as it was deemed by the court, but it could not be considered a forfeiture of individual rights for the community to succeed to the share of the deceased member, because it was a matter of voluntary contract by him with ample consideration. Therefore, no partition of lands could be had by the heirs of the deceased member of the community.⁴⁰ The party bringing such action could not claim an accounting for the rents and profits of the lands, for at the death of his ancestor no title or interest in the property passed to, or became vested in him.

An incumbrance created upon an inheritance by an ancestor is a good defense against the payment of the valuation of the money by the heir to whom the estate was allotted in proceedings in partition.⁴¹ Where an heir takes land at an appraised valuation, his own share of the appraised land is merged in the fee.

The object of partition is to have an equitable division of the property held in common by the co-tenants, and that each may have his or her individual share of the property or of the proceeds of the sale of the property, after considering the equities arising in the case in favor or against each co-tenant. For the sake of convenience in equity, a recompense may be made by a sum of money to one of the parties, so as to prevent injustice or unavoidable neglect, or the court may order a sale of the subject

⁴⁰ *Goesele v. Bimeler*, 14 How. U. S. 589.

⁴¹ *Seaton v. Barry*, 4 Watts & S. 183.

matter and a division among the several owners according to their respective titles, taking into consideration such equities as each may be entitled to, and allowing a full and fair compensation for adjustment, making the charges against such co-tenant or co-tenants as equity would demand. When a court of equity obtains jurisdiction of a subject matter for any purpose, it will retain it for all purposes of affording adequate and full relief between the parties.⁴²

⁴² *Shelly v. Shelly*, 8 Watts & S. 153; *Pell v. Ball*, 1 Rich. Eq. 361, *ante*; *McGillivray v. Evans*, 27 Cal. 92; *Royston v. Royston*, 13 Ga. 425; *Graham v. Graham*, 8 Bush, 334; *Thurston v. Minke*, 32 Md. 571; *Ross v. Ramsey*, 3 Head, 15; *Wallace v. Wallace*, 6 West. R. 113.

CHAPTER XXVI.

ABATEMENT.

IT is a rule of practice generally that an action does not abate by any event, even by death, if the cause of action survives or continues.¹ In case of the death of a sole plaintiff, or a sole defendant, if the cause of action survives or continues, the court, upon motion, must allow, and, in fact, compel the action to be continued, by or against the representative, or successor in interest.² Judgment against a party, who dies before a verdict is rendered, or before the report or decision is actually entered against him, cannot be entered. In case such a judgment should be entered, the verdict, report, or decision is absolutely void, and the judgment entered upon it is worthless.³ The decision referred to, is the written findings of facts and the legal conclusions with the directions for the final judgment to be entered, and which must constitute a part of the judgment-roll.⁴

In an action of partition, upon the death of one of two or more of the plaintiffs, or upon the death of one of

¹ N. Y. Code Civ. Pro. § 755. See 44 N. Y. 666; 59 Id. 450.

² N. Y. Code Civ. Pro. § 757; *McGregor v. McGregor*, 35 N. Y. 218; *Richardson v. Draper*, 87 Id. 337.

³ N. Y. Code Civ. Pro. § 765.

⁴ *Adams v. Nellis*, 59 How. Pr. 385.

two or more of the defendants, the interest of the deceased person in the property passes to a person not a party to the action, such party may be made defendant by the order of the court ; and the court may direct and the law allows a supplemental summons to be served upon him, so as to bring him regularly before the court, that his interest in the premises sought to be partitioned and owned by him, by reason of his inheriting the same from the deceased co-tenant, may be properly passed upon and equitably adjudicated.⁴ Where a bill is filed for partition of real estate and for an account of the rents and profits received by the defendants, and the suit afterward abates by the death of the complainant, the heir at law may apply by petition to revive the suit, so far as relates to the partition of the estate and the rents and profits subsequent to the descent to such heir, without joining with the personal representatives of the original complainant, who are entitled to the rents and profits which accrued before that time. If the personal representatives of the decedent neglect to revive the suit, so far as their interest is concerned, the defendants may proceed as in other cases where the representatives of a sole complainant neglect to revive the suit after his death.⁵

After judgment for sale and partition and the advertising the sale had commenced, plaintiff died, and such

⁴ If, upon the death of one of two or more plaintiffs, or one of two or more defendants, in an action for partition, the interest of the decedent in the property passed to a person, not a party to the action, the latter may be made defendant by the order of the court ; and a supplemental summons may be issued, to bring him in accordingly. N. Y. Code Civ. Pro. § 1588.

⁵ *Hoffman v. Tredwell*, 6 Paige, 308 ; *Ferrers v. Cheney*, 1 Eq. Cases Abr. 4 pl. 11.

of his heirs as were not parties defendant were substituted in his place as plaintiff. The court held there was no irregularity in continuing the advertisement in the same form as originally commenced, and selling the premises in pursuance thereof. In speaking of what had been done, Justice Ingraham said: "I do not see that such a course was in any way necessary. The Code, section 121, provides for such a case, and authorizes the court to order the action to be continued by his successor in interest. The action is to be continued—to proceed—not to go back and repeat what had been done, but to be continued. If the successor had been made defendant, he might have claimed the right to put in an answer and defend, but the plaintiff could do no such thing; by coming in as plaintiff, he assumes all the former plaintiff's acts, admits the proceedings previously taken to be correct, and adopts them as his own, and by proceeding he is estopped from afterwards denying the regularity of the judgment and subsequent proceedings. There are other reasons why it was not necessary to proceed anew. The judgment of partition and sale was perfect before the death. The rights of the parties thereafter were not in the land, but in the proceeds. Whenever the plaintiff's share vested, the partition was necessary, and the interest attached to the money, the proceeds of the sale, rather than to the land. The same sale and partition must be made as before, and the only difference would be in the distribution of the share of the deceased party, which would be regulated on motion. I am of the opinion there was no irregularity in the proceeding, and that the purchaser should complete his purchase." ⁶

⁶ *Thwing v. Thwing*, 18 How. Pr. 458; referring to N. Y. Code of Pro. (Old Code) § 121. See 9 Abb. Pr. 323.

In one case decided by the Court of Appeals of New York the facts are briefly set forth as follows : " C., plaintiff's husband, conveyed certain premises to his brother G.; plaintiff did not join in the deed. After the death of G., C., as one of his heirs, brought an action for partition of the premises ; plaintiff was made a party defendant. The complaint alleged that she claimed an inchoate right of dower in the premises because she had not signed said deed, and that each undivided portion was subject thereto. The summons, with notice of object of action, was served upon her. She did not appear. Final judgment made no provision for her dower. Upon sale under said judgment defendant became the purchaser. In an action to recover dower, held, that judgment in the partition suit was a bar ; that it was the intent of the provisions of the Revised Statutes in reference to partition (2 R. S. 318, section 5, *et seq.*) to cut off the inchoate right of dower of any party to a partition suit, as a general rule ; that if the position was tenable, that the claim for dower, being an adverse one accruing before the title of the tenants in common, could not be determined in the partition suit, it should have been presented in some form in that action ; and, having failed to do so, this plaintiff could not claim in another action that she was unlawfully deprived of her dower right." C. died before the entry of the decree. The Court of Appeals said that her death could not affect the rights of the purchaser, so far as this action was concerned ; that it could only be considered upon application to the court in the partition suit.⁷ In this action the court had jurisdiction of the subject matter and over the parties, and the decree was

⁷ *Jordan v. Van Epps*, 85 N. Y. 427, *ante*.

entered in due form after the death of C., and it does not appear that anything was done, so far as the action is concerned, in relation to his death, or any question raised until after the decree of sale had been entered. If any ground for complaint existed by reason of this default, it should have been presented in the partition case by an application to the court. Not having been presented, it was not a proper subject for consideration by the appellate court.

Where, after the expiration of the time to answer by one defendant, and before putting in an answer, that defendant dies, and the action is continued without making his heirs or devisees parties, the subsequent proceedings are void as to the interest of such deceased defendant, even though, after the sale, such heirs or devisees appeared upon various motions in the case.⁸ The case of *Requa v. Holmes* was again reviewed by the Court of Appeals in 1863, and there it was decided that it was no estoppel of the heirs, or any ratification by them of the sale, that, upon the petition of the representative of their ancestor's grantor, assuming to act also in their behalf, a portion of the proceeds of the sale were applied to the payment of a judgment against such grantor; nor that, upon the consent of one assuming to act as their solicitor, a portion was invested as a dower fund for the widow of the grantor; nor that, after the death of the widow, and pending their action to recover the premises, the heirs received their proportion of the funds so invested. This was no election to take the money instead of the land.⁹ Where one of several ten-

⁸ *Requa v. Holmes*, 16 N. Y. 193.

⁹ 26 N. Y. 338; reversing 19 How. Pr. 430. See *Waring v. Waring*, 7 Abb. Pr. 472.

ants, in partition, dies pending the action, all that is necessary to put the case in the position to proceed is to obtain, within a year, an order, under section 121 of the Code (Old Code), that the action be continued against those who have succeeded to the interest of the deceased party. It is usual to give notice of such application; but where the surviving defendants have no interest in the action, and would have no right to resist a motion for a supplemental complaint, notice is unnecessary. Where such application is made within a year after the death of the party, a supplemental complaint is unnecessary.¹⁰ In a partition suit, where the original parties to the suit admit their several titles to the property by their pleadings, if one of them dies and the suit is revived against his heirs at law by default, the court may declare the rights, titles and interests of the several parties without a reference as to the title, and without requiring the complainant to exhibit proof of the same or an abstract of the conveyances by which the title is held.¹¹ Where a partition suit abates, and new parties are brought before the court upon the revival of the suit, a new reference will be necessary to ascertain their rights, before sale can be decreed.¹²

It is claimed that the case last cited has been reversed, but there is nothing in the statutes referred to, or in any decisions that have been made, that would indicate that there was any reversal upon the decision of the court wherein defendant claims that a new reference will be necessary to ascertain the rights

¹⁰ *Gordon v. Sterling*, 13 How. Pr. 405. See *Coon v. Knapp*, *Id.* 175; *Green v. Bates*, 7 *Id.* 296.

¹¹ *Wilde v. Jenkins*, 4 *Paige*, 481.

¹² *Reynolds v. Reynolds*, 5 *Paige*, 161.

before a sale of the premises can be decreed. It is a matter of common sense that if new parties are brought in by reason of the death of one of the parties to the action, the new parties being brought in because of an interest inherited by them in and to that portion of the premises owned by their ancestor as tenant in common, that their rights, though inherited from him, being somewhat different from his rights, they owning in common that of which he died seized, a new reference would be necessary, and would be the only means to ascertain their interests in the premises, so that such interests could be properly set forth in the interlocutory judgment.

CHAPTER XXVII.

GUARDIANS OF INFANTS, COMMITTEES OF LUNATICS, IDIOTS, OR HABITUAL DRUNKARDS.

THE conveyance of property made by a person not of sound mind, and who has been so declared, and a guardianship or commiteeship placed over him, is void. Such a conveyance cannot be sustained by the court, because it is an act of a human being who did not know what he was doing, and therefore, not his voluntary act and deed, it having been done while he was under the disability of being of unsound mind, and a decree to that effect having been entered which was a warning to all persons that his acts and business transactions had no force and were void.¹

In some instances the deed of an idiot, or an insane person, who has not been so declared by the court, and not in the custody of the court, and not being under a guardianship by having a committee appointed over him, passes a seizin, and is regarded as voidable only, and not void.² In New York and Pennsylvania a deed given by such a person is void, and in New Jersey it is only voidable.³ The act of an infant is regarded by the

¹ *Wait v. Maxwell*, 5 Pick. 217; *Rannells v. Gerner*, 80 Mo. 474; *Pearl v. McDowell*, 3 J. J. Marsh. 658.

² *Griswold v. Butler*, 3 Conn. 231.

³ *Allis v. Billings*, 6 Met. 415; *Arnold v. Rich Iron Works*, 1 Gray, 434; *Howe v. Howe*, 99 Mass. 98; *Eaton v. Eaton*, 37 N. J. L. 108. See 5 Pick. 217; 9 N. Y. 45; 9 Wall. 626; 83 Ind. 18.

court as analogous to that of an idiot or lunatic, and the deeds made by infants may be avoided as well against the grantees of their grantees as the infant's grantees themselves.⁴ It is often difficult for the court to define what degree of capacity in the one selling the property is sufficient to enable him to make a proper valid sale,—that is, a sale that is not void or voidable. The law knows no such thing as partial insanity in dealing with the property of insane persons, and the phrase "partial insanity" is something that has yet to become a legal term, to have any effect so far as concerns the property or estate of an idiot. Provisions are made for the appointment of a committee over the person and property of an idiot, lunatic, or habitual drunkard, thus placing the person so under disability under the guardianship of the court, the committee or guardian appointed by the court being its officer and its agent as to the estate of the person thus under disability. Of course, when the court shall have stepped in and placed such idiot, lunatic, or habitual drunkard under its guardianship, then it is easy for the court to draw the line that all dealings, transactions and conveyances by such person, while so under the guardianship of the court, are void: but when that guardianship does not exist, then the court must draw the line from the circumstances and conditions governing the case. A general finding of insanity appointed by a commission for that purpose does not of itself avoid a deed.⁵ There must be other circumstances connected with the case than the mere findings of the commission to make the deed illegal. The law seems

⁴ *Van Deusen v. Sweet*, 51 N. Y. 384; *Rogers v. Blackwell*, 49 Mich. 192.

⁵ *Jones v. Hughes*, 15 Abb. N. C. 141.

to be settled that ordinarily a deed made by an infant is not void, but merely voidable.⁶ Deeds executed by infants sometimes are void, and at other times voidable.⁷

There are not a great many cases or authorities in regard to the partition of property, where one of the co-tenants of the property is a lunatic, though there are some. The fact is recognized that although a person may be a lunatic, and that a guardian or committee has been appointed over him and his property by the court, the title to his property, whether such be in co-tenancy or not, is vested in such lunatic, and the legal title thereto can in no way be affected by any suit at law or in equity, unless such lunatic is properly made a party to the action.⁸ A lunatic or idiot, or a person under disability by reason of infancy, weakness of mind or habit, and under the guardianship of the court, must be made a defendant in the action of partition, the same as if he were of sound mind; and the allegations in the complaint pertaining to his co-tenancy must be to the same effect as if he were

⁶ 2 Blacks. Comm. 291; *Whitney v. Dutch*, 14 Mass. 457; *Tucker v. Moreland*, 10 Pet. 58; *Roof v. Stafford*, 7 Cow. 180; *Boston Bank v. Chamberlin*, 15 Mass. 220; *Bool v. Mix*, 17 Wend. 119; *French v. McAndrew*, 61 Miss. 187; *Bingham v. Barley*, 55 Tex. 281; *Kline v. Beebe*, 6 Conn. 494; *Drake v. Ramsay*, 5 Ohio, 252.

⁷ *Co. Lit.* 389.

⁸ On questions touching conveyances made by idiots, lunatics, habitual drunkards, or infants, the following cases may be of interest, though not deemed by the author to be of sufficient interest to be cited in full by giving a full text of the decisions made by the court. 4 *Harring*. 75; 8 *Ind.* 110; 9 *Vt.* 368; 53 *Me.* 453; 6 *Gray*. 279; 15 *Ohio*, 156; 44 *Ark.* 293; 60 *Miss.* 420; 71 *Ala.* 248; 83 *Ind.* 382; 16 *N. H.* 385; 76 *Ala.* 343; 57 *Tex.* 482; 11 *Johns.* 539; 9 *Wall.* 618; 6 *Conn.* 506 66 *Ga.* 179; 78 *Va.* 584; 102 *U. S.* 300; 93 *Ind.* 423; 7 *Allen*, 1; 10 *Pet.* 75; 53 *Mich.* 15; 81 *Mo.* 221.

⁸ *Gorham v. Gorham*, 3 *Barb. Ch.* 41.

not under such disability, together with the further allegation setting forth concisely and fully the disability of mind or habit then resting upon such co-tenant. Where a bill or complaint for partition shall be filed against a person of weak intellect and he answered by guardian, the court has power to make the usual order for a commission, and power to decree the usual interlocutory judgment, taking into consideration the mental condition of such person so answering by guardian or committee, and protecting his or her rights throughout the action.⁹

The court of chancery has jurisdiction to appoint a guardian for an infant, because the infant is the ward of the court, and it has been well settled that in the appointment of that guardian, when there may be proper reasons for so doing, the court may exclude the father of the infant and disregard his wishes.¹⁰ In a suit under the English partition act of 1868, for the confirmation of a conditional contract for the sale of land, to which the infant plaintiff and the infant defendant were entitled as co-heirs, subject to the dower of their mother, an order was made confirming the conditional contract, and directing a sale, and the decree was prefaced by a recital that a sale appeared more beneficial than a division, and that the infant plaintiff requested such sale. Of course, such request must necessarily be made upon the behalf of the infant by his guardian *ad litem* in the action.¹¹ When a guardian shall have been appointed, and shall have duly qualified to the satisfaction of the court appointing

⁹ *Heirs of Bryant v. Stearns*, 16 Ala. 306; *Hollingworth v. Sidebottom*, 8 Sim. 620; *Freem. on Co-ten.* § 469.

¹⁰ *Wellesley v. Wellesley*, 2 Bligh N. S. 124; 1 Dow. N. S. 152.

¹¹ *Grove v. Comyn*, 18 E. R. Eq. 357.

him, it is his duty, as soon as the circumstances of the case will allow, to take possession and control of the estate of his ward, wherever it may be and whatsoever condition it may be in. If the ward be a co-tenant, with an action pending against him for the partition of the property under the co-tenancy, it is the guardian's duty to act in the case for the infant, and to see that the infant's interests are properly cared for. It is the general idea of equity that the appointment of a guardian means protection to the one over whom the guardian is appointed ; thereafter it becomes the duty of the guardian to take into his possession and under his control the rights, property and interests of his ward.¹²

The Revised Statutes of New York provide, that whenever it shall appear satisfactorily, by due proof, or when it shall appear by the report of a referee to the Supreme Court, that a minor holds real estate in joint tenancy, or as tenant in common, or in any other manner, so that he would be entitled, upon proper application to the court, to partition, or so that he could be made a party to a suit in partition, and that the interest of the infant is such, or the interest of any other person concerned in the property is such, that partition of such estate should be made, the court may direct and authorize the general guardian of such infant to agree to a division of the land, or to a sale of the land, or of such part of the same as, in the opinion of the court, would be incapable of being partitioned, or as shall be most for the interest of the infant to be sold.¹³ The court will not authorize a guardian to join in a sale, except on the report of

¹² *Micou v. La Mar*, 7 F. R. 180.

¹³ 3 N. Y. R. S. 6 ed. § 101.

the master that such sale is necessary and proper; and the guardian must give security for the faithful performance of his trust on such sale, and to bring the proceeds of the infant's share into court, or to invest and account for the same. If a co-tenant wishes to buy the share of an infant in an estate which cannot be divided, and such co-tenant is willing to pay a fair value for the same, it is the duty of the guardian to apply to the court for liberty to sell, under the article of the Revised Statutes relative to the sale and disposition of infant's land. It is ample ground to authorize a sale in such cases, that the land is held in common with adults, and that the value of the estate is small, as compared with the expense of a partition suit, to which it must be subjected, unless a sale of the infant's portion can be made.¹⁴

It is the duty of the guardian in such matters to report to the court, on oath, the partition or sale so made by him, and if the same shall be approved and confirmed by the court, an order shall be entered authorizing such guardian to execute conveyances of the right of such infant to such part of the said estate as shall have been sold, to the purchaser thereof, or to execute releases of the right of such infant to such part of the said estate as in the said division falls to the shares of the other joint tenants or tenants in common. The deed so given by the guardian is as valid and effectual, and conveys the share and part of such infant, the same as if it had been executed after the infant shall have arrived at full age. And the statute considers and says, in substance, that in case of the sale of the property, or any part of it, the infant shall be deemed the ward of the court, and such

¹⁴ *In 26 re Congdon, 2 Paige, 566.*

order shall be made and taken as the court may direct, for securing, investing and applying the proceeds of the sale, the court requiring security from the guardian for that purpose. If the infant be a married woman, the court may, upon proper petition, appoint her husband as her guardian. The husband, when appointed as such guardian, is subject to the same rules and regulations as any other person that might have been appointed in his stead.¹⁵

When it appears to the satisfaction of the court, upon the application of a committee of a lunatic, idiot, or person mentally incapable of managing his affairs, holding real estate as co-tenant with others, or in such manner as to authorize his being made a party to a suit in partition, that the interest of such idiot, lunatic, or other person, or of any of the parties interested in such estate, requires partition, such application shall be sent to a referee to inquire into and report upon the facts and circumstances. The court, upon the coming in of the report, and a hearing and examination of the matter, may authorize the committee of such incapable person to agree to a partition in the same manner in which the guardian of an infant may agree to a partition, and may sell or release the infant's portion in the premises, and the deed of conveyance or release so made is as binding upon such incapable person as if the same were made by him when of full age and of sound mind ; but it is necessary in such cases that there shall be a full and fair consideration got for the interest of the infant or incapable person in the lands. ¹⁶

¹⁵ 3 N. Y. R. S. 6 ed. p. 597, §§ 102, 103, 104 ; N. Y. Laws of 1830, c. 320, § 47 ; New York Laws of 1814, § 2, p. 129.

¹⁶ 3 N. Y. R. S. §§ 105, 106, 107.

This brings us to the practice in New York state as laid down in its Code of Civil Procedure, which is somewhat similar to the practice and rules of the New York Revised Statutes, having been to a certain extent drafted therefrom. The Code gives the guardian of an infant, or the committee of an idiot, lunatic, or habitual drunkard, who is a co-tenant with others in real estate, the right to make partition of the property so held in common. The application for the privilege to do so upon behalf of such infant or incapable person, may be made to the supreme court or to the county court of the county, or to a superior city court of the city, wherein the property sought to be partitioned is situated.^b The application made to the court having proper jurisdiction must be by a petition, which petition must describe the real property proposed and to be partitioned: it must state facts, so that the court may know the rights and the interests of the several owners in the property: and if a partition of the property is proposed instead of a sale, such petition must state specifically the particular division proposed to be made. The petition must be verified, as required by the Code for the verification of other petitions. If the court deems best, it may order that notice of the application for authority to agree to a partition of such real estate, shall be given to such persons as the court thinks proper.^c

^b Where an infant, idiot, lunatic, or habitual drunkard, holds real property, in joint tenancy or in common, the general guardian of the infant, or the committee of the idiot, lunatic, or habitual drunkard, may apply to the supreme court or to the county court of the county, or to a superior city court of the city, wherein the real property is situated, for authority to agree to a partition of the real property, N. Y. Code Civ. Pro. § 1590.

^c Such an application must be by a petition, which must describe the real property proposed and to be partitioned; must state the rights and interests of the several owners thereof; must specify the particular partition proposed to be made; and must

If, upon due inquiry into the merits of the application, the court having a right to make an order of reference for that purpose, or to order the application itself, it should be in the opinion of the court, and should appear that the interests of the infant, idiot, lunatic, or habitual drunkard will be promoted by a partition of the premises so held in common, the court may make an order authorizing the petitioner to agree to the partition proposed, and in the name of the person so incapable of agreeing, to execute and deliver releases of his right and interest in the property.⁴ Such releases have the same effect and validity, as if they were executed by the person in whose behalf they were actually executed, and such person not having the disability of infancy resting upon him, or being incapable of so executing such releases, by reason of idiocy, lunacy, or habitual drunkenness.⁵

be verified by affidavit. The court may order notice of the application to be given to such persons as it thinks proper. N. Y. Code Civ. Pro. § 1591.

⁴ If, after due inquiry into the merits of the application, by a reference or otherwise, the court is of the opinion that the interests of the infant, or of the idiot, lunatic, or habitual drunkard will be promoted by the partition, it may make an order authorizing the petitioner to agree to the partition proposed, and in the name of the infant, or of the idiot, lunatic, or habitual drunkard, to execute releases of his right and interest in and to that part of the property which falls to the shares of the other joint tenants or tenants in common. The court may, in its discretion for the furtherance of the interests of said infant, idiot, lunatic, or habitual drunkard, direct partition to be so made as to set off to him or them his or their share in common with any of the other owners, provided the consent in writing thereto of such owners shall first be obtained. N. Y. Code Civ. Pro. § 1592.

⁵ Releases so executed have the same validity and effect, as if they were executed by the person in whose behalf they are executed, and as if the infant was of full age, or the idiot, lunatic, or habitual drunkard was of sound mind, and competent to manage his affairs. N. Y. Code Civ. Pro. § 1593.

The relation of parent and child tends rather to rebut than to raise the implication of a contract.¹⁷ To maintain an action for use and occupation, a contract express or implied must be proved.¹⁸ The father, as guardian by nature, has no right to receive the rents and profits of his child's lands.¹⁹ It could not well be assumed that the relation of landlord and tenant would exist between the father, as guardian by nature, and the tenant upon the premises. To collect rents there must exist the relation of landlord and tenant.²⁰ The father, as guardian by nature, might receive the rents and profits of his child's lands, and render a just and proper account for the amount received by him. The court, as a matter of custom and usage, could approve of the same so long as the interest and right of the infant child had been protected. When the father is controlling the lands as a tenant in common with his child, his receiving the rents and accounting therefor in such case would have, in addition to his being the natural guardian of his child, the further element in favor of his receiving the same, he being a co-tenant with his child, and his possession being the possession of the infant co-tenant, the court would naturally, where the father and children were living harmoniously together, sanction the receiving of the moneys by the father, being rents and profits belonging to the children, providing the father make no attempt to misappropriate such funds.

A guardian has no power to convey the interest of the

¹⁷ *Clarke v. Clarke*, 2 N. Eng. 213.

¹⁸ *Chamberlin v. Donahue*, 44 Vt. 57; *Moore v. Harvey*, 50 Id.

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¹⁹ *Jackson v. Combs*, 7 Cow. 36; *Oakes v. Oakes*, 16 Ill. 106,

²⁰ *Stacy v. Vt. Cent. R. R. Co.*, 32 Vt. 551.

ward as heir at law in the land without an order of court. A deed given by the guardian, without authority of the court, conveys no title, especially where such deed has been obtained from the guardian with knowledge of its invalidity and induced by misrepresentations.²¹ Such a deed would not take from the infant his interest in lands held by him as tenant with others; and the court would have a right, in the protection of such equitable interest, to direct that he might partition the premises by suit at law, and that he have the full benefit of his ownership in the lands. The law is well established that a sale secured by fraud and misrepresentation is voidable at the option of the vendor;²² and certainly a sale, procured through fraud and misrepresentation, of lands belonging to an infant, and the sale made not in conformity with the rules of the court, the parties to such sale having knowledge of the non-conformance to such rules, should be, and is absolutely void.²³ When the guardian or committee shall have completed his duty in seeing to the interest of his ward, and in protecting his rights in the common property, it then becomes his further duty to account for and pay over all moneys of his ward that may be remaining in his possession; and his duty as such guardian is not complete until he shall have done so.²⁴

The New York practice requires that suit by or against infants must be prosecuted or defended by a guardian *ad litem*, and not by next friend; and the court

²¹ *Cooter v. Dearborn*, 2 West. R. 399.

²² *I Hillard Vend.* 335.

²³ Females are of age at eighteen years under some statutes. *Kilgour v. Gockley*, 83 Ill. 109; *Davis v. Hall*, 92 Ill. 85.

²⁴ *Merrells v. Phelps*, 34 Conn. 109; *Bryant v. Owen*, 1 Kelly, 355; *Scofield v. Churchill*, 72 N. Y. 565.

having jurisdiction of the action has the power to make the appointment of the guardian.²⁴ The guardian *ad litem*, or friend, or, in case of an idiot, lunatic or habitual drunkard, the committee, must appear in court upon behalf of his ward ; and such appearance must become a part of the record in the action.²⁵ It is proper that the court should require that the person appointed to represent the party thus under disability shall be a responsible person ; and in cases as important as partition cases, where considerable property may be involved, such persons so appointed by the court as guardian or committee, should be responsible, and pecuniarily liable for the costs of the action.²⁶ If the guardian of an infant plaintiff is not conducting the action upon behalf of his ward properly, the court may remove him, and have some suitable person appointed in his place.²⁷

The appointment of a guardian is of so much importance that it is deemed an error to render a decree without it, or upon the appearance of an attorney merely, and the decree so rendered may be set aside.²⁸ A sale of lands in partition is binding upon an infant if the judgment ordering it was regular. But when it appears that the property of infants has been sacrificed through negligence of their guardians, a resale may be procured, full indemnity being

²⁴ *Hoftailing v. Teal*, 11 How. Pr. 188.

²⁵ *Miles v. Boyden*, 3 Pick. 213; *Judson v. Blanchard*, 3 Conn. 579; *Heft v. McGill*, 3 Penn. St. 256.

²⁶ *Cook v. Rawdon*, 6 How. Pr. 233; *Dalrymple v. Lamb*, 3 Wend. 424; *Pearce v. Pearce*, 9 Ves. 547.

²⁷ *Fulton v. Rosevelt*, 1 Paige, 178; *Hardy v. Scanlin*, 1 Miles, 87.

²⁸ *McDonald v. McDonald*, 3 W. Va. 676; *Quigley v. Roberts*, 44 Ill. 503; *Barber v. Graves*, 18 Vt. 290; *Porter v. Robinson*, 3 A. K. Marsh. 253; *White v. Albertson*, 3 Dev. 241; *Taylor v. Rowland*, 26 Tex. 293; *Bloom v. Burdick*, 1 Hill, 130.

made to the purchaser, and the court may grant an order for such resale on its own motion.²⁹ Special guardians of infants and committeees of persons under mental disability ought to receive for their services, in such cases, a proper and reasonable compensation. It is true that their right to such compensation does not accrue until they shall have fully performed their duty.³⁰ Notwithstanding the appointment of the committee of the person and estate of a lunatic, the property remains vested in the lunatic.³¹ The duty of the committee of the lunatic or of the guardian of the infant being for the protection of the property of such idiot or lunatic, it is no more than equity that he should receive compensation for such services as he performs in protecting the rights of his ward in the action.

²⁹ *LeFevre v. Laraway*, 22 Barb. 167.

³⁰ *Matter of Will of Budlong*, 1 Cent. R. 286. See 4 Paige, 85; 7 Id. 521, 544.

³¹ *Smith v. Commissioner of Taxes*, 1 Cent. R. 289; *McKillip v. McKillip*, 8 Barb. 552; *Lane v. Schermerhorn*, 1 Hill, 97.

CHAPTER XXVIII.

THE PEOPLE AS PARTIES TO THE ACTION. RECORDING COPY OF JUDGMENT.

THE people may become tenants in common with others in various ways. The State may as a matter of necessity, for the purpose of protecting its own interest, or for the purpose of gaining property for purposes essential to the business of the State, purchase the interest of a tenant, and thereby the co-tenancy extends to the State, and the people of the State, as such, own in fee the interest of the co-tenant whose rights and title the State had purchased. The law of escheat is such that the title to land may by escheat pass to the commonwealth. Escheat is laid down among the sources of title to lands mentioned by some of the most able authors. Escheat has an ancient definition, like this: it signifies in a legal sense any lands or other profits that fall to a lord within his manor, by way of forfeiture, on the death of his tenant dying without heir. It is an accidental reverting of lands to the original owner. All estates which so revert, are called an escheat, which in English laws are declared to be strictly feudal, and to import the extinction of tenure.¹

In the United States, the State or the commonwealth

¹ Wright Ten. 115, 117.

of the State steps in, and takes the place of the feudal lord, by virtue of the sovereignty of the State, and by virtue of its being the original proprietor of all lands now held within its jurisdiction.² One might say that the Federal Government was an original proprietor over all the lands now held within the jurisdiction of the several States of the Union ; but in the forming of the Territories into States, and in the recognition of the thirteen colonies as States by the Federal Constitution, and by all acts on the part of the Federal Legislature, the United States releases all its title, right and interest in and to the sovereignty of the public within the boundaries of each State. This release upon the part of the general government was a release for all time to come of the rights then held by the State, or of any expected or future rights by reason of the law of escheat, by a release by the government to the respective States of all rights to the land that the government then had, or might have so long as those States remain loyal to the Union, thereby placing the State in the position of the original holder and owner of the title to the public lands.

Different States have different rules and regulations made by statute in regard to the law of escheat. In some States lands cannot descend from an alien to his heirs, as only citizens are supposed to have the right of ownership in land. In case of the death of an alien to whom has passed, and in whom title is resting at his death, the land covered by such title becomes the property of the State by escheat. If one dies without heirs, then there is no one to inherit and no one to which the title of lands will pass. In such a case, the land so held by the

² 4 Kent Comm. 424.

person dying without heirs passes by escheat to the State. It is considered to be the universal rule of civilized society that when the deceased owner has left no heirs, the title to his lands should be in the public and be at the disposal of the government.³ Where lands escheat to the State, through defect of heirs of the person dying seized, the State may grant the same, without actual entry or inquisition ; even though it be held adversely by one claiming title thereto. Such a grant will pass the title of the State, to the grantee, and passes to the grantee the right of the State to institute and prosecute a suit for the recovery of land.⁴

The objection that there must be an entry upon the lands escheated by the State, is founded upon the English rule to the effect that the king cannot enter upon, or grant, the land until his title is found by inquisition. This rule seemed to have been a necessity by certain English statutes.⁵ Such rule does not prevail here. In some States, especially in New York, the Revised Statutes recognize the right of the State to take immediate possession of the lands which would otherwise be in abeyance through the death of the last tenant in fee without heirs.

The New York Revised Statutes provide that the people of that State, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State ; and all lands, the title of which shall fail, from the defect of heirs, shall

³ Brown Civil Law, 250; 1 Swift Dig. 156; 2 Bl. 244, 245; 9 Rich Eq. 440; 5 Cal. 373; 4 Md. Ch. 167; 48 Tex. 567; 86 Pa. 284.

⁴ *McGaughal v. Ryan*, 27 Barb. 376.

⁵ Westminster I. ch. 24; 18 Henry VI. c. 6.

revert or escheat to the people.⁶ Lands held by the State, and gained by them by virtue of the laws of escheat, are subject to the same trusts, incumbrances, charges, rents and services, to which they would have been, had they descended to heirs. Such land, and, in fact, all lands within the State are declared to be allodial, so that the entire and absolute property therein is vested in the owners, subject only to its liability to escheat to the State. Feudal tenures being absolutely abolished, thus it can be seen that when land is owned by a number of co-tenants, or owned in such a way that the share of one co-tenant becomes vested in the State at his death, or that whenever the commonwealth or State becomes a co-tenant with others in certain lands, that the State is subject to the same rules and regulations pertaining to the partition of such lands, as if it were an ordinary individual; and the lands so owned partly by an individual, and partly by the State, as tenants in common, are subject to the same rules as other lands owned in co-tenancy; and the court has the same jurisdiction over them both legal and equitable in cases of partition. The people of the State may be made party defendant to an action in partition of real property, the same as any private person. Where the State shall be made a party defendant as aforesaid, the summons must be served upon the attorney-general, and it is his duty to appear in the action on behalf of the people.⁷

⁶ 3 N. Y. R. S. 7 ed. 2162, § 1; *People v. Van Rensselaer*, 9 N. Y. 319; *Wadsworth v. Buffalo Hydraulic Association*, 15 Barb. 94; *People v. Van Rensselaer, ante*; 8 Barb. 189.

⁷ The people of the State may be made a party defendant to an action for the partition of real property, in the same manner as a private person. In such a case, the summons must be served upon the attorney-general, who must appear in behalf of the people. N. Y. Code Civ. Pro. § 1594.

Lands located in two or more counties may be the subject of one action of partition where the parties are the same. In such a case, an exemplified copy of the judgment-roll, or of the final judgment, in the action, may be recorded, in the office for the recording of deeds, in any county in which such land affected by the judgment in the action is situated.^b The former distinction between decrees in equity and judgments in actions at common law has not been abolished, but is inherent in the two systems. In a suit for partition the rights of the parties are fixed and settled by the final decree, and not by the enrollment thereof. The delay of the clerk in entering the decree of the court in equity in the judgment-book will not affect the validity of the judgment.⁷ A transcript of a docket of judgment should be a copy of such docket, and in order to make it the duty of a county clerk to whom such transcript is presented to file it and docket the judgment in his office, it must be attested in such form as to show, by some intelligent statement of the fact in the attestation clause, that the instrument to which such attestation is appended is a transcript of the judgment docket kept in the office of the clerk signing the attestation clause.⁸

^b An exemplified copy of the judgment-roll, or of the final judgment, in an action for partition, may be recorded, in the office for recording deeds, in each county in which any real property affected thereby is situated. N. Y. Code Civ. Pro. § 1595.

⁷ *Lynch v. Rome Gas Light Co.*, 42 Barb. 591.

⁸ *Crittenden v. Keenan*, 18 N. Y. Week. Dig. 502.

CHAPTER XXIX.

PURCHASER.

THE last requisite of a perfect title is the right of property which may exist in one person, when the apparent right appears to be in another, and the other person have the possession of the property. An action of partition should settle all questions pertaining to the right of possession of the property and the right of ownership thereto. The modes of acquiring land,—the principal of which is by purchase,—are divided into two, the other being by heirship or descent. The action of partition having been conducted through, step by step, until a sale shall have been had, then comes the question as to the rights of the purchaser and his duties which he must necessarily perform in completing his purchase. He is entitled to a proper title to the premises, and is entitled to the rights of those whose interests have been sold, and he should receive those rights divested from any incumbrance, or from anything that will interfere with his use and enjoyment of the property hereafter. He has the right to require a good title, and will not be compelled to complete his purchase and accept a deed which leaves him to the uncertainty of a doubtful title, or to the hazard of a contest with other parties which will seriously affect the value of his property.¹ If this were

¹ *Jordan v Poillon*, 77 N. Y. 518, *ante*.

not so, there would be but little use of a partition, or of a sale of the premises, because, in case of a sale, if a good title could not be conveyed to the purchaser, then a purchaser could not, in some instances, be procured. The title procured upon a sale, as the result of such action, should be respected.² If the defendants in the action have not all been properly served with process, the court will not compel the purchaser to complete his purchase.³ Where the statute, in reference to service of process upon absent defendants, has not been strictly complied with, the order of sale in the partition proceedings is fatally defective. Conceding that the affidavit, in reference to the residence of the defendants, might have been honestly made, and that the plaintiff had no knowledge or belief as to the place of residence of those defendants, who were absentees, the statute must be fully complied with, and the affidavit should show that the residence of such defendants could not be ascertained with reasonable diligence.⁴ Unless the statute should be complied with, the court would have no jurisdiction of such defendants. The jurisdiction of such defendants, being purely statutory, can only be acquired by the mode provided and prescribed by the statute.⁵ Admission of the service of process out of the State is ineffectual, and does not give the court jurisdiction.⁶ The court in the exercise of equity powers will not compel an unwilling purchaser to take a doubtful title. But where a party seeks to dis-

² *McLenathan v. McLenathan*, 2 Pen. & W. 279, *ante*; *Manly v. Pettee*, 38 Ill. 128, *ante*; *Wood v. Fleet*, 36 N. Y. 499; *Brown v. Martin*, 20 Barb. 123; *Pomeroy Rem. and Rem. R.* §§ 373, 374.

³ *Cook v. Farnam*, 21 How. Pr. 286.

⁴ *Hallett v. Righters*, 13 How. Pr. 43; *Burham v. Peabody*, 3 *Id.* 109.

⁵ *Litchfield v. Burnett*, 5 How. Pr. 341.

affirm and rescind a contract of sale, and to recover back the deposit of his purchase money, on the ground of a defective title, he must satisfy the court that the title is absolutely bad, before he can recover.⁶ When objections are made to the title of real estate, in consequence of certain defects in the proceedings, and, upon a reference made by the court, it is found that such objections were well taken, and it being impossible to cure them, the sale should be rescinded, and the purchaser reimbursed.⁷ The purchaser is entitled to be protected by the court, even against an error.⁸

The referee in a partition suit must be obedient to the order of the court appointing him. In one important case, decided in New York, all the parties to the action for partition were heirs at law of a former owner of the premises, who died intestate, and such heirs took their titles to the lands from the former owner by descent. The complaint in the action alleged that each of the nine parties, plaintiffs and defendants, were seized in fee simple, and entitled to, one equal undivided one-ninth part of said premises. The judge before whom the action was tried

⁶ O'Rielly *v.* King, 28 How. Pr. 408; citing 8 Car. & P. 248; 32 Barb. 48; 4 Y. & C. 237; 2 Duer, 158.

⁷ Parisen *v.* Parisen, 46 How. Pr. 385.

⁸ Holden *v.* Sackett, 12 Abb. Pr. 473, *ante*; Dorsey *v.* Thompson, 37 Md. 26; Wood *v.* Lee, 31 La. Ann. 505; McCahill *v.* Eq. Co., 26 N. J. Eq. 531; Yaple *v.* Titus, 41 Penn. St. 195; Kingsland *v.* Spalding, 3 Barb. Ch. 341.

^a As to discharging purchaser, see Mead *v.* Mitchell, 5 Abb. Pr. 92; Croghan *v.* Livingston, 6 Id. 350; Disbrow *v.* Folger, 5 Id. 53; Rogers *v.* McLean, 10 Id. 306; 11 Id. 440; Jennings *v.* Jennings, 2 Id. 6; Alvord *v.* Beach, 5 Id. 451; 17 N. Y. 218; Blakeley *v.* Calder, 15 Id. 617, *ante*; 34 Id. 536; 31 How. Pr. 279; Varian *v.* Stevens, 2 Duer, 635; 31 Barb. 305.

without a jury, found, as a matter of fact, and held as conclusion of law, that eight, out of the nine parties and heirs, had been advanced by the intestate, in sums differing in amount; to the ninth, no advance whatever had been made; and the judge held and decided, as a conclusion of law, and adjudged, that the parts and shares of said premises, belonging to the plaintiffs and other parties to the action, were correctly stated and set forth in the complaint; and that the plaintiffs were entitled to judgment for partition and division of such lands and premises between them, in accordance with the prayer or demand of the complaint; which demand was, that partition might be made according to the rights and interests of the several parties who were tenants in common in the estate. The judgment or decree followed the conclusions of law, and adjudged and decreed that each of the said plaintiffs and defendants were entitled to an equal undivided one-ninth part of the said land and premises. The fact that advancements had been made was entirely disregarded, and no notice of such advancements was taken, in the decree, or in the conclusions of law, but each party was decreed and adjudged to be entitled to the same as though no advancements had been made. The appellate court held that this was a manifest error, and that the exceptions to the findings and conclusions of law, in this respect, were well taken. It was probable in this case, in view of all the facts presented to the court, that some of the parties had no share or interest, whatever, in the lands in question; that the shares of such as did inherit were altogether unequal in proportion, inasmuch as their advancements all differed in amount. The decree provided that the referee pay and discharge, out of the proceeds of the sale, all taxes, charges and assessments,

which might be a lien upon the premises. It appeared, by his report of sale, that he sold the property subject to such liens. Notwithstanding the other errors in the case, the court held that the order confirming the report was erroneous, and the same was reversed, and the sale set aside and vacated, as being contrary to the decree. Such reversal and setting aside of the sale relieved the purchaser from the errors and irregularities in the case.⁹

The court will not discharge the purchaser, and relieve him of his purchase, by reason of any irregularities which may be amended. Any error in stating the interests and shares of the parties, in a partition suit, or any omission to state what, on motion, the plaintiff might have been compelled to insert by way of amendment, is not an irregularity which can affect the title, where the persons interested therein are all parties to the action and are therefore concluded by the decree. A purchaser will not be discharged because of the plaintiff's omission to allege, in his complaint, that there are no other parties in interest, or incumbrancers, than those joined; nor on account of the referee's omission to annex to his report the searches for incumbrances.¹⁰ Where, in a judgment, the sale was directed to be advertised three weeks instead of six, as required by law, but, in fact, the advertisement was published six weeks, it was an error which could be amended, and the purchaser, if unable to give any other reason, must complete his purchase and perfect his title.¹¹ Questions relative to the suitableness of guardians *ad litem*, their attention to the interests of their wards, the money had by administrators

⁹ Hobart *v.* Hobart, 58 Barb. 296.

¹⁰ Noble *v.* Cromwell, 26 Barb. 475; 3 Abb. Ct. App. Dec. 382; 27 How. Pr. 289.

¹¹ Alvord *v.* Beach, 5 Abb. Pr. 451, *ante*.

on behalf of such ward, and the amount of the estate, do not concern the jurisdiction of the court, or the regularity of the sale, nor furnish ground for relieving the purchaser of his purchase. The failure of the referee to follow the decree in respect to the terms of the sale, when such failure is not shown to be prejudicial to the infants, is not an error or irregularity of which the purchaser may take advantage. Upon proof that the deviation, upon the part of the referee, was not prejudicial to the infants, but desirable for their interest, the court should direct a modification of the decree *nunc pro tunc*. The purchaser cannot object that the sale was not made on the day to which the referee had adjourned it, where the court, on confirming the sale made on the day first appointed, has directed the sale of the remaining premises to stand over to a future time, such order having the effect to nullify the adjournment ; and the sale subsequently made, after publication of notice as directed by the decree, is regular. Neither can the purchaser object that there are mortgages upon the property which the referee was not prepared to satisfy at the time for the delivery of the deed, when it appears that the amount to be paid upon the sales was sufficient to extinguish the mortgages, and that the holders were at hand to receive the money and discharge the liens. Nor can he object that the title is defective because it came through a grantee who stood in relation of trustee at the time he purchased in his own right the same, forty years previously, where no evidence is produced to show that he did not account to a *cestui qui trust*, and it appears that the property has since been frequently transferred without any claim being made by reason thereof.¹²

¹² *Herbert v. Smith*, 6 Lans. 493.

The court may release the purchaser from his bid on the ground of unreasonable delay to his prejudice on the part of the sellers. It is the duty of the court to give the purchaser the benefit of his purchase, and where, by the fault of the parties, the completion of the sale has been delayed so long that he cannot have the benefit of his purchase, the same as if the sale had been completed at the time contemplated by the terms of the sale, the court will not compel him to take title.¹³

The purchaser must not neglect to complete the sale within a reasonable time; he must perform that portion of the contract that is imposed upon him by reason of his bid and purchase; he has no right to delay those whose interest he is purchasing from completing their part of the business or withholding from them the proceeds of the sale to which they are justly entitled.¹⁴

The mistake in the boundary lines may be remedied in equity, both as between the original owners and their grantees, who purchased with the understanding that the recognized line was the one described in the deed.¹⁵ Equity will give relief against a mistake and will reform a deed, where the description of the premises given in the deed, in consequence of the mistake of the parties, embraces more or less land than was intended.¹⁶ Deeds may be reformed not only in cases where the mistake

¹³ *Jackson v. Edwards*, 7 Paige, 387, *ante*; 22 Wend. 497; 55 N. Y. 15.

¹⁴ 7 Paige, 387, *ante*; 22 Wend. 498, *ante*.

¹⁵ *May v. Adams*, 2 N. Eng. 203.

¹⁶ *Bush v. Hicks*, 60 N. Y. 298; *Winnipisiogee Co. v. Perley*, 46 N. H. 83; *Bailey v. Woodbury*, 50 Vt. 166; *Wilcox v. Lucas*, 121 Mass. 21; *Broadway v. Buxton*, 43 Conn. 282; *Beardsley v. Knight*, 10 Vt. 185; *Shattuck v. Gay*, 45 Vt. 87; *Tabor v. Cilley*, 53 Vt. 487; *Freeman's Bank v. Vose*, 23 Me. 98; *Adams v. Stevens*, 49 Me. 362.

consists in the omission or insertion of words or clauses contrary to the intention of the parties.¹⁷ The court having the equitable right to correct mistakes and errors in deeds, it would seem that a mistake in a deed which was within the province of the court to correct would not excuse the purchaser from completing his purchase. In case a deed with errors in it—such errors as the court of equity could correct—should be tendered or delivered to the purchaser, if the title to the premises purchased by him was correct, and he could by reason of his purchase receive that which he bid at the sale, the court would compel him to complete the purchase upon there being tendered to him a correct and proper deed. There might be an instance of this kind arise in practice, though in all probability such instances would be rare, because, as a general thing, errors in the deed made by the officer making the sale would be discovered previous to its delivery to and acceptance by the purchaser, and in all probability, in the majority of partition cases, the purchase will be complete upon the part of both the seller and the purchaser upon the delivery of the deed.

One who buys at a judicial sale may demand a title free from any reasonable doubt, as condition precedent to the completion of his purchase.¹⁸ One standing in a fiduciary capacity cannot under any circumstances purchase or deal with the property which he holds in trust.¹⁹ Where no sale under the order in partition proceedings was

¹⁷ *De Riemer v. Cantillon*, 4 Johns. Ch. 85.

¹⁸ *Rice v. Barrett*, 3 Cent. R. 440; *People v. Stock Brokers Building Co.*, 92 N. Y. 98.

¹⁹ *Lewis Trust & Trustees*, 2 Am. ed. 394, 398, 402; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Dobson v. Racey*, 3 Sandf. Ch. 66; *Ames v. Downing*, 1 Bradf. 321; *Gardner v. Ogden*, 22 N. Y. 327; *Van Epps v. Van Epps*, 9 Paige, 237.

made by the sheriff at the term designated in the order, he had no power to make the sale at a subsequent term without a renewal of the order, either by the court or clerk. Such sale would be void. If the original deed is void when made, it remains void; and cannot be changed so as to be made valid.²⁰ Confirmation of the sale gives finality to the proceedings and is conclusive upon the parties. The rule is generally that the deed is not subject to collateral attack. The confirmation of the sale is a judicial decision that the sale is valid, and the parties to the suit are estopped to deny its validity when questioned collaterally.²¹ The court must take into consideration, notwithstanding the above general rule, that the purchaser of the land is not a party to the action, and while the parties to the action may be bound by the judgment, and the final judgment valid and correct so far as the parties to the action are concerned, it is not binding upon the purchaser, and in no way governs or controls him or his purchase, unless such final judgment and all the proceedings pertaining to the action are such that he receives upon his purchase a reasonably good title to the lands.

The title to the premises should be readily ascertained by the record. The record should show the sources of title to the tenants in common of the parties to the action. Deeds should be explicit. In Indiana, it has been held that the commissioner's deed should describe the kind of record, number of volume and page, wherein the order or judgment is entered, by virtue of which the person named

²⁰ *Carson v. Hughes*, 6 W. R. 665.

²¹ *Lasell v. Powell*, 7 Cold. 282; *Harrison v. Harrison*, 1 Md. Ch. 332; *Koeller v. Ball*, 2 Kans. 160; *Phillips v. Dawley*, 1 Neb. 320; *Henry v. McKerlie*, 78 Mo. 430.

as a commissioner was appointed by the court,—that is, that the deed should show his authority to execute the particular deed in question, to the end that the grantee in such a deed, and all persons thereafter interested in the land described therein, may readily ascertain from the record, the true history of the commissioner's authority to execute such deed.²² The record should show who the parties to the action were, and that the proceedings were properly conducted. When such is the case, there being no errors or irregularities, the conveyance by the commissioner is binding effectually.²³ Such a deed would pass proper title to the purchaser, and he would be compelled to complete his purchase.

The purchaser of land at a judicial sale is entitled to a marketable title.²⁴ A title open to reasonable doubt is not a marketable one, and the court cannot make it one by passing upon an objection depending upon a disputed question of fact or a doubtful question of law, in the absence of the party in whom the outstanding right is vested. A purchaser at a partition sale under such circumstances will not be compelled to complete his purchase where there are objections to the title, and the title is not a marketable one. He need not hazard his interest by taking such a title, and the court will not compel him to do so.²⁵ To sustain a defense of defect of title in an action to compel the performance of a contract for the purchase of land, there must be at least a reasonable doubt as to the vendor's title, such as affects its value

²² *Singer v. Scheible*, 8 W. R. 404.

²³ *Arnold v. Butterbaugh*, 92 Ind. 403; *Elston v. Piggott*, 94 Ind. 14.

²⁴ *Fleming v. Burnham*, 100 N. Y. 1.

²⁵ *Shriver v. Shriver*, 86 N. Y. 576; *Argall v. Raynor*, 20 Hun, 267.

and would interfere with the sale of the land to a reasonable purchaser. Defects in the record or paper title may be cured or removed by parol evidence.²⁶ A title open to a reasonable doubt is not such a title as would find a ready purchaser. For that reason it cannot be termed a marketable title. It would be injustice to compel a purchaser to take a title, the validity of which depended upon some question of fact, where, when the facts should be presented to the court, the decision might be so changed, or so made that great injury might be done to the purchaser, and the title to his property much changed thereby. Where such a case presents itself to the court, the purchaser should be discharged and relieved from his purchase.²⁷

Where real property is directed to be sold by the court, it must be sold in the county where it is situated, unless some other provision shall have been made by law.^b The referee appointed to make such sale, may be compelled to give such securities, as the court deems best, for the proper application of the moneys received by him upon the sale, or for the payment thereof by the purchaser, directly to the person or persons entitled there-

²⁶ *Hellriegel v. Manning*, 97 N. Y. 56; *Smith v. Wells*, 69 Id. 600; *Jordan v. Poillon*, 77 Id. 518, *ante*; *Weeks v. Tomes*, 10 Hun, 349.

²⁷ 100 N. Y. 1; 97 Id. 56; 86 Id. 575.

^b Except where special provision is otherwise made by law, real property, adjudged to be sold, must be sold in the county where it is situated, by the sheriff of the county, or by a referee, appointed by the court for that purpose, who must execute a conveyance to the purchaser. The conveyance is effectual, to pass the right, title or interest, of a party, adjudged to be sold. But nothing contained in this section shall be deemed to repeal or modify the provisions of any law specially regulating the sale of real property, under a judgment or decree of any court, in any particular county of the state. N. Y. Code Civ. Pro. § 1242.

to, or their attorneys.^a It would seem by this that the court anticipated that the purchaser may, in some instances, pay the purchase money directly to the person or persons entitled to the same, and that such payment made by the purchaser is as valid as if made to the sheriff or referee appointed to conduct the sale, such payment entitling the purchaser to the proper conveyance of the property. The conveyance should state the particular party or parties, whose right, title or interest is directed to be sold, and must distinctly state, in the granting clause of the conveyance, whose right, title or interest was sold, and is conveyed. If the deed or deeds of conveyance fail to make such statement, the purchaser is not bound to accept the conveyance, and the officer making such sale is liable for the damages, which the purchaser sustained by reason of such omission, whether the purchaser accepts or refuses such conveyance.^b

The purchaser may be allowed to give security that he will complete the purchase made by him. The surety of a purchaser of real estate, under a decree in partition,

^a Where a referee is appointed by the court, to sell real property, the court may provide for his giving such security, as the court deems just, for the proper application of the money received upon the sale; or for the payment thereof by the purchaser, directly to the person or persons entitled thereto, or their attorneys, N. Y. Code Civ. Pro. § 1243.

^b A conveyance of property, sold by virtue of an execution, or sold pursuant to a judgment, which specifies the particular party or parties, whose right, title or interest is directed to be sold, must distinctly state, in the granting clause thereof, whose right, title or interest was sold, and is conveyed, without naming in that clause, any of the other parties to the action; otherwise, the purchaser is not bound to accept the conveyance, and the officer executing it is liable for the damages, which the purchaser sustains by the omission, whether he accepts or refuses to accept it. N. Y. Code Civ. Pro. § 1244.

becomes a party to the proceedings, and may properly invoke the aid of the court for his protection ; and, upon default in payments by the purchaser, the court will order the property resold upon the petition of the surety. The first purchaser will be entitled to any surplus remaining after such resale, over the sum due on the installments unpaid and costs adjudged by the court.²⁸ The purchaser is not entitled to a deed, until the purchase money is paid ; or, at any rate, until he shall have complied with the conditions of sale.²⁹ Upon the default of the purchaser, under a decree in chancery, the court has power to order a resale.³⁰

The purchaser is liable for any loss or damage occasioned by reason of his refusing to carry out the sale and complete his purchase. The remedy against him is by an application to the court to compel him to complete it, or to resell the property, and hold him liable for the loss and the additional expenses. Such application will be disposed of by the court upon equitable principles, and facts would be considered which could not be allowed to influence the decision of a suit at law.³¹ At first, there was some hesitation as to the power of the court of chancery in such cases. Lord ELDON doubted whether he had the power to commit a purchaser, or do more than discharge him from his purchase ; but at length made

²⁸ *Rout v. King*, 1 West. R. 593.

²⁹ *Swain v. Morberly*, 17 Ind. 99; *Swindell v. Richey*, 41 Ind. 281; *Stout v. McPheeters*, 84 Ind. 585; *Deputy v. Mooney*, 97 Ind. 463.

³⁰ *Stephens v. Magruder*, 31 Md. 168; *Munson v. Payne*, 9 Heisk. 672; *Mosby v. Hunt*, Id. 675; *Long v. Weller*, 29 Gratt. 347; *Thornton v. Fairfax*, 29 Id. 669; *In re Pettillo*, 80 N. C. 50; *Warfield v. Dorsey*, 39 Md. 304.

³¹ *Miller v. Collyer*, 36 Barb. 251.

the order, observing that a purchaser could not be allowed to baffle the court.³² In 1811, a decision was made against a purchaser that he pay his purchase money within a time set, or, in case of default, that the property be re-sold, and the purchaser pay the deficiency from the price of his purchase and the price at the resale, with the costs.³³ This case was afterwards approved in another, in which there had been an order discharging the purchaser from his purchase, but at the same time ordering a resale, and holding him for the deficiency.³⁴ The early cases did not proceed strictly upon the ground of contract, but upon the ground that when a person became a purchaser under a decree, he submitted himself to the jurisdiction of the court as to all matters connected with the sale or with him in his character as purchaser. This has been decided in New York State, and, undoubtedly, was the most proper reason given by the court of chancery for compelling a resale and holding the purchaser liable for damages. The chancery decision is, that where a person becomes a purchaser under a decree of that court, he submits himself to the jurisdiction of that court in that suit as to all matters connected with such sale, or relating to him as the purchaser of such property.³⁵ Notwithstanding that the purchaser places himself within the jurisdiction of the court, there is, as we believe, an implied contract upon his part with the vendors, that he will complete the purchase made by him, and that he will comply with the rules and regulations of the sale, bringing to it a further element in favor

³² *Lansdon v. Elderton*, 14 Ves. 512.

³³ *Gray v. Gray*, 1 Beav. 199.

³⁴ *Harding v. Harding*, 4 Myl. & C. 514.

³⁵ *Requa v. Rea*, 2 Paige, 339; citing *Cassamajor v. Strode*, 1 Sim. & S. 381.

of his paying damages for not completing his purchase as it would be damages for the non-fulfillment of a contract upon his part made by him, or which the court would have a right to imply was made by him by reason of his bid and his title of the sale.

CHAPTER XXX.

REVIEW OF JUDGMENT, VACATING AND SETTING ASIDE SALE.

THE sale by virtue of an interlocutory judgment in partition actions is a judicial sale. The court retains jurisdiction of the matter, and is empowered to review all the proceedings pertaining to the action, providing it is plainly to be seen that the sale has been improperly brought about, or fraud used in procuring the interlocutory decree, or the sale fraudulently conducted.

The grounds for setting aside judicial sales are more limited in America than in England. In some instances, the mere inadequacy of price, unattended by any other circumstance, is not sufficient to set aside the sale, or to authorize the court to direct a re-sale of the lands. If the interlocutory judgment shall have been fully obeyed, the advertisement of sale having been published as directed, and the necessary notices having been posted, as the law and practice requires, there being no collusion at the time of the sale, the person conducting the sale striking off the property at the greater price bid to him therefor, then the court is not authorized to set aside the sale because there is an inadequacy of price as compared with the full value of the property. A resale will be ordered when there has been fraud or misconduct in the purchaser, or of some person connected with the sale, or for

surprise created by the purchaser or other interested persons. In case of fraud, collusion, or surprise, inadequacy of price becomes an element in the case, and will have greater or less weight with the court in making their order for a resale of the premises. The inadequacy of price will be a single element in favor of a resale only when that inadequacy of price is the result of fraud, or collusion by persons connected with the sale—especially the purchaser.

A collusive arrangement to prevent competition at a judicial sale, and a sale in pursuance of such arrangement, to the injury of an infant, is a fraud in law, whether made with or without the consent of his guardian *ad litem*, and subsequent mortgagees and purchasers with a knowledge of the fraud can gain no advantage therefrom. These questions of fraud are not matters of discretion, and, when involved in an order, they may be reviewed in the appellate court, the same as if presented upon a bill of exceptions. An infant party to an action is entitled to the protection of the court upon summary application to set aside such a sale, as well as in a formal action. When the right to relief has been once established, it is not within the discretion of the court absolutely to reject the summary application and remit him to his action. A refusal to grant relief upon a summary application is not ordinarily a final adjudication of the merits of the controversy. It will bar another summary application, unless leave shall have been given to renew, but it will not affect any other remedy that the parties may have.¹

¹ Howell *v.* Mills, 53 N. Y. 322; citing 49 Id. 227; 22 Barb. 227; 2 Story Eq. Jur. § 1334; 13 Wend. 227; 26 Id. 143; Story on Agency, 140; 19 Paige, 315; 29 N. Y. 418; 23 Id. 160; 3 Id. 334; 16 Wend. 372; 18 Id. 350; 3 How. Pr. 357; 28 N. Y. 122; 30 Id. 80.

The English practice of opening biddings and ordering a resale before the confirmation of the sale, upon an offer being made of an advance of ten per cent. and an indemnity to the purchaser, has not been adopted in New York State. In that State, neither before nor after the confirmation of the report of the sale, will a resale be ordered upon an offer to increase the price. Special circumstances must exist, where the sale is not void, to justify an order for a re-sale. It will be ordered where there has been fraud or misconduct in the purchaser ; fraudulent negligence or misconduct in any other person connected with the sale ; or surprise or misapprehension created by the conduct of the purchaser, or of some person interested in the matter, or of the officer who conducts the sale. Infant owners will always be relieved from such fraud, negligence, misconduct, surprise or misapprehension, by a resale, when it plainly appears to the court that their property has been sacrificed at such sale by reason of fraud, negligence or misconduct, as aforesaid. The rights of the infants must not be invaded, or injured, or prejudiced so that they become the losers thereby. The court must protect them. And, in case of fraud upon them at a judicial sale, there is no other way by which the infant can be protected than to direct that a sale be opened and a resale of the premises be had.²

The biddings at a master's sale will not be opened except in very special cases, and then it will not be done unless the purchaser is fully and liberally indemnified for

² *Lefevre v. Laraway*, 22 Barb. 168 ; *White v. Wilson*, 14 Ves. 181 ; *Morice v. Bishop of Durham*, 11 Id. 57 ; *Lansing v. McPherson*, 3 Johns. Ch. 424 ; *May v. May*, 11 Paige, 201 ; *American Ins. Co. v. Oakley*, 9 Id. 259 ; *Brown v. Frost*, 10 Id. 244 ; *Billington v. Forbes*, Id. 487.

all damages, costs and expenses to which he has been subjected. A sale of the property of adults will not be disturbed when it has been sacrificed in consequence of their own negligence.³ Chancellor Kent permitted a resale in one case, upon the ground that infants were interested in the sale of the property ; that the executors of a mortgagee were innocently misled, and induced to believe that the sale of the mortgaged premises would not take place on the day appointed, there being no culpable negligence on their part.⁴ These English decisions are cited by Chancellor Kent, upon the question of English practice of opening biddings at the master's sale and that the English courts under their practice require the deposit of a reasonable advancement together with the purchaser's expenses. But the practice now seems to be, and, in fact, it is more just that the purchaser who has been guilty of fraud should be the loser, because the court directed a resale by reason of such fraud, that the loss is for him to sustain, and not for those who were innocent and whom he attempted to injure by reason of his fraudulent act.

The application to set aside a sale made in pursuance of a judgment of the court, in an equitable action, is addressed to the discretion of the court.⁵ The granting or denying of the application is a matter within the discretion of the court to whom the application is made ; but, if innocent parties have been defrauded by reason of the

³ *Duncan v. Dodd*, 2 *Paige*, 99. See *Clarke Ch.* 103, 481 ; 2 *Edw. Ch.* 617.

⁴ *Williamson v. Dale*, 3 *Johns. Ch.* 290 ; citing *Livingston v. Byrne*, 11 *Johns.* 566 ; 1 *Ves. Jr.* 453 ; 4 *Ves.* 700 ; 6 *Id.* 466, 513 ; 7 *Id.* 420 ; 8 *Id.* 214 ; 14 *Id.* 151 ; 1 *Ves. & B.* 361 ; 3 *Id.* 144 ; 14 *Ves.* 151.

⁵ *Winter v. Eckert*, 93 *N. Y.* 368.

fraudulent acts of the purchaser at the sale, or of those connected therewith, then it becomes the duty of the court to protect those who are innocent of the fraud. This rule is applicable where the parties to the action are adults, and are not affected by any mental disability, such as would debar them in any court from protecting their own interests. If, on the other hand, persons who are debarred are infants, lunatics, idiots, or habitual drunkards, the statute makes it the bounden duty of the court to protect the interests of such persons, and in such case it is not a matter of discretion with the court. If fraud has been committed, so that persons thus under disability suffer and their property is sacrificed by reason of such fraud, then the court must protect them. The discretion of the court is entirely taken out of the matter, for the duty of the court is imperative. If it lies entirely within the discretion of the court, there can be no review of the decision by the courts of the last resort; but in case of infancy, lunacy, etc., this is an element in the case, which will be seen as by examination of the cases already referred to, pertaining to fraud committed as against infants, and the review of the proceedings, and the opening of the sale, and the ordering of a resale, in cases where infants' interests have been injured, is a matter of justice and right. Orders and decrees that are discretionary are not usually appealable. ⁶

The rule is well established that a court of equity may, in its discretion, set aside a sale made under its decree, and may order a resale, where fraud is alleged, upon

⁶ *Peck v. New York & New Jersey Ry. Co.*, 85 N. Y. 246; *Hale v. Clauson*, 60 Id. 339; *Crane v. Stiger*, 58 Id. 625; *Hazelton v. Wakeman*, 3 How. Pr. 357; *Buffalo Savings Bank v. Newton*, 23 N.Y. 160; *Dows v. Congdon*, 28 Id. 122.

facts casting such a degree of suspicion upon the fairness of the sale as to render it, in its judgment, proper to set aside the sale and order a resale, although fraud may not be clearly established. The Special Term order setting aside a sale under such circumstances may be reviewed by the General Term, but it is a general rule that where only the rights of the parties to the action are involved, no appeal can be had to the Court of Appeals.⁷ Courts of equity exercise a supervision over sales made by virtue of their decrees, which is not in all cases controlled by legal rules, but may be guided by considerations resting within the discretion of the court. They may set aside their own judicial sales, upon grounds insufficient to confer upon the objecting party the absolute right to a resale. Courts of equity may grant relief against mere mistakes, accidents, hardships, or unfair and dishonest conduct of others, though such conduct may not amount to a violation of the law. If the circumstances surrounding the case are such as to cast suspicion upon the fairness of the sale, and if the court believes it expedient under all the circumstances to vacate such sale, it may do so, though the alleged fraud may not have been clearly established. Judicial sales, when fairly conducted, should not be set aside except for good reasons. The party asking to have the sale set aside should not be guilty of laches. He should move at once. A motion made for a resale thirteen months after the sale, by one who had notice of the original proceedings, is too late. Such delay is laches.⁸ When a judicial sale has been set aside, it is regarded as no sale.⁹

⁷ *Fisher v. Hersey*, 78 N. Y. 387.

⁸ *Clafin v. Clark*, 22 N. Y. Week. Dig. 137.

⁹ *Fisher v. Hersey*, 12 Week. Dig. 534; 85 N. Y. 633, *ante*.

A final judgment in an action for partition is not more exempt from the interference and control of courts of equity than are final judgments and decrees in other cases. Mistakes of facts, or such an accident as would authorize a court of equity to enjoin or set aside an ordinary judgment, would justify a court of equity in setting aside or correcting a judgment or decree in partition. And, in a proper case, where no extrinsic circumstances were to be considered by the court, the remedy may be by motion. Where the judgment in partition was entered more than ten years ago, and the parties had entered into the possession and were in control of the rents, issues and profits of the premises, or of the parcels of the premises set off to them respectively in severalty, the premises consisting of different parcels of different values, the land divided being subject to known incumbrances, the partition being a long, intricate and difficult proceeding, and involving, to a great extent, the judgment and discretion of the commissioners appointed by the court to make the partition, one of the commissioners having died since the partition was made, the court held that these facts afforded sufficient reason for denying summary relief by a motion in the original partition suit.¹⁰

The case of *Marvin v. Marvin*, being in the courts for a number of years, became somewhat noted as furnishing a large amount of practice for the lawyers interested and the courts of Western New York. Upon the motion to open or set aside the final judgment or decree of partition, Judge Talcott in his opinion says: "But in the case now at bar there seem to be various objections to this

¹⁰ *Marvin v. Marvin*, 52 How. Pr. 97.

summary mode of relief. The judgment in partition was entered more than ten years ago, and the parties then entered into the possession and the pernancy of the rents, issues, and profits of the various premises, to them respectively set off in severalty. The partition involved many distinct parcels of land, differently situated or of different values, and many parcels of the land divided were subject to known incumbrances. The commissioners were authorized, by the commission appointing them, to cause surveys to be made of the several parcels, and were required, in making the partition, to have regard to the liens and incumbrances thereon by taxes, tax sales and mortgages, which were set forth in the report of the referee, and were also required and directed, in making said partition, to have regard to the leases of certain portions of the property which were made by the mother of the co-partitioner in her life-time, and which were particularly described in the report of the said referee. The partition was a long and intricate proceeding, and involved, to a great extent, the judgment and discretion of the commissioners, one of whom is now dead." The decision of the court in this case was that the proper remedy was by a new action, in the nature of a bill of review, and, in such a suit, the further alienation of the property partitioned to the copartitioner, might, if necessary, be restrained by a notice of *lis pendens*, or an injunction order, and, after examining and disposing of all questions, whether of fact or law, bearing upon the equitable rights of the parties, a decree might be made for a repartition, if the situation of the premises should be such as to render that course practicable without injustice; if not, then such other equitable relief might be given as

the situation of the parties and the property might seem to require.¹¹

To justify the court in setting aside a partition of real estate on the ground of a mistake in judgment on the part of the commissioners, the mistake must be a serious one and the evidence of it too plain to be mistaken. If the evidence is doubtful or contradictory, the report will be sustained.¹²

The appellate court may review the judgment. It is supposed that the interlocutory judgment determines the rights of the parties to the action and that it should decide the whole issues between the parties, and leave nothing open and reserved, except matters of detail in carrying out the interlocutory judgment. If the complaint demands an account for rents and profits, if the court should construe that the defendant's liability to make such an account was limited by the statute of limitations to six years before the commencement of the action, unless the question should be raised at the trial, it cannot be raised in the appellate court, and that court cannot review the judgment upon the ground that an accounting was had for more than six years, the subsequent proceedings being in conformity with the interlocutory judgment, and the final judgment being a decree confirming what is done after and pursuant to the interlocutory judgment. The special term in rendering the final decree simply gives effect and affirms the interlocutory judgment and completes the action. Questions to be brought before the appellate court upon review must first be raised upon

¹¹ Citing Allnatt on Part. 156; Rawle on Covenants, 473, 474, 475, 477; Freem. on Co-ten. 533, 534; *Walker v. Hall*, 15 Ohio, 355; 4 Kent, 367; *Bridges v. Howard*, 18 Iowa, 116.

¹² *Thomson Cas. 2 Green Ch.* 637.

the trial; otherwise, if the subsequent proceedings are in accordance with the interlocutory judgment and in obedience thereto, those proceedings will not be disturbed by the court.¹³

The appellate court upon review may examine into the correctness of the principle upon which the court below rendered its decree. Where the equities of the case give some of the parties an interest in specific parcels, they are entitled to have the actual value of such parcels ascertained; and a judgment directing that the value of the parcels assigned on account of such equities, should be estimated at the same rate as the other parcels bring upon a sale, is error, unless it appears by the record that it did not work injustice. The principle of partition is the same where a sale is necessary, as where actual partition is made; and the rights of the parties in the proceeds of sale are the same as in the lands themselves.¹⁴ A judgment of partition is not defective because the affidavits on which service of summons by publication was ordered, did not allege the non-residence of the parties who were thus served, or state upon information and belief, the inability to find them within the State. It is enough to give jurisdiction that the fact that the defendants could not with due diligence be found within the State, appeared to the satisfaction of the judge to whom the application was made.¹⁵ A lessee of lands, the reversion in fee of which is in tenants in common, may, upon purchasing a part of the re-

¹³ *Taggart v. Hurlburt*, 66 Barb. 553.

¹⁴ *Warfield v. Crane*, 4 Abb. Ct. App. Dec. 525, *ante*.

¹⁵ *Van Wyck v. Hardy*, 4 Abb. Ct. App. Dec. 496. See 11 Abb. Pr. 473; 20 How. Pr. 222.

version, demand a partition, even though it will necessarily result in a sale of the premises.¹⁶

The right to partition is imperative and absolutely binding upon courts of equity, where a case is fairly brought within the law authorizing a partition. When they can grant the relief demanded in the petition, they are bound to do so. When they can see no legal objection, it is a matter of right which the petitioner has to demand, and of duty which the court must perform, to decree a partition of the promises set forth in the petition, reserving, of course, by virtue of the law, all the equities of the case and the trial of the whole proceedings from the commencement to the end. The rule is somewhat general that partition cannot be had of an estate in remainder.¹⁷ At common law, parceners only were compellable to make partition by writ, but the benefit of that writ was afterwards extended to joint tenants and tenants in common.¹⁸ In England, the prevailing rule is that no person has the right to require any court to enforce a compulsory partition, unless he has an estate in possession. This rule prevails in a majority of the United States. In New York, it is held that proceedings in partition can be only by the party who has an estate entitling him to immediate possession.¹⁹ If the action is carried on, and the sale had without objection, although the judgment in some respects be erroneous, such sale would confer a perfect title upon the purchaser;²⁰ and the court will not review or set aside the judgment under such circumstances.

¹⁶ *Hill v. Reno*, 54 Am. R. 222; 112 Ill. 154.

¹⁷ *Wood v. Sugg*, 49 Am. R. 639; 91 N. C. 93.

¹⁸ 31 & 32 Henry VIII.

¹⁹ *Brownell v. Brownell*, 19 Wend. 367. See *Ex parte Miller*, 90 N. C. 625; 36 N. H. 327; 8 Id. 93.

²⁰ *Blakeley v. Calder*, 1 Smith, 617.

All the lands held in common by the parties need not be included in the bill in the action. If a party conceives that he will suffer because a portion of the lands held in common has been omitted, he can, by proper pleading, have all the lands so held in common disposed of in one suit. Such pleading is essential. When a portion of the premises have been omitted in the first pleading or complaint, it can be amended. The omission of such land is not a proper ground for setting aside the sale and ordering a resale. In an action of partition, the interest of one tenant in common may be set off to him in land, although the balance of the land is held by so many tenants in common that it will be to their interest to order a sale of their shares.²¹ Neither is it sufficient ground to set aside a sale because the sale was made on the day of a charter election, the statute forbidding the courts to open, or transact business, in any city or town, on the day of elections, for other than town or militia officers.²² A judicial sale, although conducted by one of the officers of the court, and under its direction, is not the business of a court, within the meaning of that statute.²³ Want of knowledge of the time and place of the sale, on the part of one who was a party to the foreclosure suit, and was therefore bound to use due diligence in obtaining information of the sale in order to protect his rights, does not afford sufficient reason for setting the sale aside.²⁴ Neither will a sale be set aside because a guardian of infants interested therein refuses to attend the sale, unless it

²¹ *Jackson v. Beach*, 2 Cent. R. 261; citing Allnatt on Part. 48; 5 Com. tit. "Pleadings," 3; *Watson v. Kelty*, 1 Harr. 517, 522.

²² N. Y. R. S. 5 ed. 148, §§ 4, 5.

²³ *King v. Platt*, 37 N. Y. 153.

²⁴ *McCotter v. Jay*, 30 N. Y. 80.

appears that such non-attendance was the cause of the property selling at a less price than it would have brought if he had attended the sale.²⁵ A decree for the sale of real estate by a trustee for purposes of partition cannot be reviewed for defects, errors or irregularities, in the proceedings, though apparent on their face, by exceptions on the order ratifying the sale. Such defects, errors or irregularities, if they exist, can only be reached and corrected by a direct appeal from the decree, or by a bill of review for errors apparent. The title must be clearly established by the evidence. The court has jurisdiction of all questions arising upon the merits for judgment by default. The question of jurisdiction is not usually open, and the court cannot examine into the merits of a decree collaterally, if the courts passing the decree had jurisdiction. The principle that where the title is in dispute, or where the legal title is doubtful, the complainant should be sent to a court of law to establish his title, only applies where the bill shows clearly a dispute of title, or where the defendant has answered and alleged, or shows such dispute of title.²⁶

The *regularity* of a judicial sale cannot be questioned collaterally, except on the ground of some fraud in which the purchaser was a participant. The requisites required by law are, in general, conditions precedent, and their performance is essential to the validity of an offer of sale. But where it appears by the record that the law has been

²⁵ *Stryker v. Storm*, 1 Abb. Pr. N. S. 424.

²⁶ *Slingluff v. Stanley*, 5 Cent. R. 609; *Boone v. Boone*, 3 Md. Ch. Dec. 497; *Campbell v. Lowe*, 9 Md. 508; *Wilkin v. Wilkin*, 1 Johns. Ch. 111; *Cooper v. Roche*, 36 Md. 563; *Manton v. Hoyt*, 43 Md. 264; *Davis v. Helbig*, 27 Md. 457; *Hunter v. Hatton*, 4 Gill, 122; *Chesapeake & Ohio Canal Co. v. Young*, 3 Md. 480.

complied with, the title of the purchaser cannot be impeached in a collateral proceeding, although the record does not show affirmatively that every step was taken which was required by law, in the making of such sale. If the record contains proper averments of citizenship to give a certain court of the United States jurisdiction, a title made by the marshal under the judgment cannot be attacked collaterally by proof that the averments as to citizenship were not true, and that the court had not jurisdiction in fact.²⁷ The court will set aside a sale made under its decree, if not fairly made;²⁸ but not on the ground of inadequacy of price alone.²⁹ But will set aside a sale made by the marshal under an erroneous description of the lands.³⁰ It is no objection to the sale that the deed, by direction of the purchaser, was made to a third person.³¹

²⁷ *Voorhees v. Bank of United States*, 10 Pet. 449; *Erwin v. Lowry*, 7 How. U. S. 172; *Griffith v. Bogert*, 18 How. U. S. 158. See 9 Mo. 722; 12 Id. 239; 16 Id. 68; 17 Id. 71.

²⁸ *Bank Alexandria v. Taylor*, 5 Cranch C. Ct. 314.

²⁹ *West v. Davis*, 4 McLean, 241.

³⁰ *McPherson v. Foster*, 4 Wash. C. Ct. 45.

³¹ *Voorhees v. Bank of United States*, 10 Pet. 449, *ante*.

CHAPTER XXXI.

LIMITATION OF ACTION.

THE New York Code makes provision that an action for the recovery of real property, or the possession thereof, cannot be maintained by a party, other than the people, unless the plaintiff, his ancestor, predecessor or grantor, was seized or had possession of the premises which are the subject of the action, within twenty years before the commencement of the action; and that a defense or counter-claim founded upon the title to real property, or founded upon a demand to rents or services arising out of the same, must be plead within twenty years from the time when such right of action accrues; and that such defense or counter-claim is not effectual, unless the person making it, or under whose title it is made, or his predecessor, ancestor or grantor, was seized or possessed of the premises in question, within twenty years before the commission of the act out of which the right of action accrued.¹

This rule in relation to the recovery of real property, or the possession of the same, is different when the people or commonwealth of the State bring the action; but in

¹ N. Y. Code Civ. Pro. §§ 365, 366.

regard to individuals the rule is general in New York that twenty years is the limit of the statute of limitations, and the action must be brought within that length of time, dating from the time the cause of action accrues. Where title of land has been acquired by twenty years' actual adverse possession, it is equally as strong as a title obtained by grant, and is not forfeited by an interruption of the actual occupation thereafter. The grantor with warranty may, subsequent to the delivery of his grant, originate an adverse possession, and is not estopped from asserting the same by a covenant of warranty. Such adverse possession is an effectual bar to an action of ejectment.² Acquiescence on the part of those afterwards claiming title may enter in and become an element in favor of those who are claiming the title adversely, and such acquiescence may be conclusive.³

The doctrine that a grantee, who has entered under a conveyance from his grantor, may lose his title by an adverse possession of his grantor, and the grantor may thus claim to hold adversely to the grantee, is settled, and upheld by well-considered cases in different States.⁴

² *Sherman v. Kane*, 86 N. Y. 57; *East River Nat. Bank v. Gove*, 57 Id. 597; *Sherry v. Frecking*, 4 Duer, 452; *Finlay v. Cook*, 54 Barb. 9; *Dempsey v. Kipp*, 61 Id. 462; *Traip v. Traip*, 57 Me. 268; *Tilton v. Emery*, 17 N. H. 536; *Stern v. Hendersass*, 9 Cush. 497; *Smith v. Montes*, 11 Tex. 24; *Zeller's Lessee v. Eckert*, 4 How. U. S. 289; *Ricard v. Williams*, 7 Wheat. 60. See 19 Hun, 273; 9 Watts, 363; 9 Cow. 530; 10 Pa. St. 236; 39 Conn. 94; 10 Pet. 432; 10 Pick. 447.

³ *Gillespie v. Torrance*, 4 Bosw. 36; *Jackson v. Rowen*, 1 Gaines, 358; *Sneed v. Osborn*, 25 Cal. 619; *Cutler v. Allison*, 72 Ill. 113; *Davis v. Babcock*, 46 Vt. 655; *Coyle v. Cleary*, 116 Mass. 208.

⁴ *Traip v. Traip*, 57 Me. 268, *ante*; *Tilton v. Emery*, 17 N. H. 536; *Stearns v. Hendersass*, 9 Cush. 497; *Holland v. Jackson*, 1 Bridgeman, 77.

In those States where there must be a right of possession, and where the statutory or code rules do not allow the question of title or possession to be considered in a partition suit, it would seem that this rule would not apply. But in those States where the courts estimate under their own practice that all questions that are in the case are before the court; that the court can try titles and the rights of the parties to possession, and decide whether the lands are held adversely or not, then the question of the limitation of the action would be raised, and the statute of limitation, so far as the same is applicable to questions pertaining to real property, would apply, unless there should be some other statute or rule especially divesting an action of partition from any of the terms or conditions of the statute of limitation. In New York the limitation in regard to actions pertaining to real property, or the rents and profits of real property, applicable to citizens, does not apply where the State is a party to the action. The rule enlarging the time of limitation, where the State is not interested in the lands, is a just one. Oftentimes, lands may be held adversely to the interest of the State in such a manner that the State is not cognizant of the facts, so that an extension of the rule, so far as the people of the State is concerned, is but a beneficent extension, giving to the people that right to which in justice they are entitled for their own protection. The people of the State of New York are prohibited from suing a person for or with respect to real property, or the issues or profits of such real property, by reason of the right or title of the people to the same, unless the cause of action shall have accrued within forty years before the action is commenced, or the people, or those from whom the people derive their interest in the property, have re-

ceived the rents and profits of the real property, or of some part thereof, within the same period of time.⁵

The twenty years' and not the ten years' limitation, applies in partition actions. The right of the owner is not barred under the Code of Procedure by a ten years' possession. A clear adverse possession for twenty years makes a title to lands which a purchaser upon a partition sale may not refuse ; he will, however, be required to take title where there are circumstances which may prevent the possession from being adverse. Such a purchaser will not be compelled to complete the purchase where there is some reasonable ground or evidence shown in support of an objection to the title, or where the title depends upon a matter of fact which is not capable of satisfactory proof, or, if capable of that proof, yet it is not so proved.⁶ A conveyance from any third person claiming under some other title may be offered in evidence by a defendant who has plead the statute of limitations against his co-tenant ; and when offered, it may be received by the court in support of the plea of an adverse holding of the premises, and not for the purpose of supporting an assault on the common title. An ouster alone of a tenant never constitutes a bar ; it merely drives him to his legal remedy to gain possession. An adverse possession may be set up in bar of a recovery, when no other disabilities exist, providing such possession under such title is hostile, in its inception, to the rights of

⁵ N. Y. Code Civ. Pro. § 362; *Shriver v. Shriver*, 86 N. Y. 576; *People v. Van Rensselaer*, 8 Barb. 189; *United States v. White*, 2 Hill, 59; *People v. Trinity Church*, 22 N. Y. 44.

⁶ *Shriver v. Shriver*, 86 N. Y. 575; *Seymour v. De Lancey, Hopk. Ch. 436*. See *Miner v. Beekman*, 50 N. Y. 337.

the claimants, and is continued for a sufficient length of time.⁷

The statute of limitations gives a remedy that may be used in defense where parties have been engaged in a joint undertaking, and either one or all of them have received money or property which should be accounted for to the other as tenant in common of the real property or of personal property.⁸ Where one tenant of real estate takes from his co-tenant a lease of the premises held in common for a term of years, and, after the expiration of the term, continues in possession, without any new express agreement between the parties, or any claim by him to be exclusively entitled to the possession, or any act done to prevent a joint occupation by his co-tenant, the latter cannot recover of him for the use and occupation of the premises, after the expiration of the term. The statute allowing an action of account, or for money had and received, to be maintained by one joint tenant or tenant in common, against his co-tenant, for receiving more than his full proportion, applies to cases where rent, or payment of money, or in kind, is received from a third party by one co-tenant, who retains for his own use the whole, or more than his proportional share, and not to a case where one tenant in common solely occupies the land, and farms it at his own cost, and takes the produce for his own benefit. A tenant in common who takes a lease of his co-tenant's moiety of the land for a term

⁷ *Phelan v. Kelly*, 25 Wend. 389; *Freem. on Co-Ten.* 153. See 7 *Cow.* 637; 7 *Johns.* 157; 10 *Id.* 292.

⁸ *Wood on Limitations*, § 24, p. 57; *Thomas v. Thomas*, 5 *Exch.* 28; *Barnum v. Landon*, 25 *Conn.* 137; *Lacon v. Davenport*, 16 *Id.* 331; *Oviatt v. Sage*, 7 *Id.* 95; *Wiswell v. Wilkins*, 4 *Vt.* 137.

subject to a specified rent, and then continues in possession of the premises after the expiration of his term, will not be considered as holding over under the lease, and thus liable to an action for use and occupation. In such cases, the presumption of the law is, that he is in possession under his own title ; and such presumption will prevail, unless there should be evidence presented that he holds the same as a tenant of his co-tenant.⁹ To take advantage of the statute of limitations, it is necessary that it should be set forth in the defendant's allegation or answer, as the court must know exactly what questions it has to pass upon, and questions of so serious nature as the statute of limitations must be first presented to the court by the pleadings.¹⁰

The limitation law in reference to the payment of taxes and possession for seven years under claim and color of title, does not, as a general rule, run as between tenants in common. To establish a bar under such law, the possession and the payment of taxes must relate to the same land which is described in the instrument introduced as claim and color of title. The statute does not run as between tenants in common, on the ground that the possession of one tenant in common is the possession of all ; and especially so where all the parties derive title from the same source or deed.¹¹ A person who takes by descent as a co-heir and tenant in

⁹ *Dresser v. Dresser*, 40 Barb. 300; *Woolever v. Knapp*, 18 Barb. 265; *Henderson v. Eason*, 9 E. L. & Eq. 337; *Sargent v. Parsons*, 12 Mass. 149; *McKay v. Mumford*, 10 Wend. 351; *Baxter v. Hozier*, 5 Bing. 288.

¹⁰ *Sturton v. Richardson*, 13 M. & W. 17.

¹¹ *Cooter v. Dearborn*, 2 West. R. 399, *ante*; *Dugan v. Follett*, 100 Ill. 588; *Busch v. Huston*, 75 Ill. 343; *Ball v. Palmer*, 81 Ill. 370.

common, in ejectment by his co-heir, or one claiming under him, cannot show that the ancestor had no title.¹²

The time of limitation fixed by statute is different among the States of the Union; some fix a less, and some a greater time: but the general law in questions of equity is the same, taking into consideration, of course, the term fixed by the statute. The statute of limitations in Illinois does not bar relief between tenants in common of the lands in an action of partition. But in that State, a delay of twelve years until after the death of an ancestor of a party who could have defended against the claim with a fuller knowledge of the facts than his heirs can do, operates against the assertion of the claim.¹³ The courts of Illinois do not decide that such delay is an actual bar to the assertion of the claim, but that it rather operates against it. The idea is that the party trying to establish such a claim after the lapse of so great a time, is to a certain extent guilty of laches, and being guilty of laches, the equities of the case are not so favorable to him, as if he had presented his claim within a lesser time, and within a time when a more full knowledge of the facts could have been presented to the courts. Possession, with or without a valid deed, or under a claim of title, is adverse. It seems, that in New York an adverse possession, taken in fraud of the true owner, will not avail to bar his right of entry, though the same may have been continued for twenty years. But, on the other hand, a mere neglect to inquire into a title by the purchaser, is not a fraud upon the owner. Nor should notice of a defect in the title be imputed to a purchaser because he is negligi-

¹² *Jackson v. Streeter*, 5 Cow. 529. See 4 Wend. 589; 11 Id. 427; 41 Barb. 81.

¹³ *Comer v. Comer*, 6 West. R. 72.

gent, so as to preclude him the benefit of the statute of limitations. Though the title of an adverse possessor be clearly defective, yet the true owner must bring his action within twenty years, or he is barred of his right of entry. The rule that what is sufficient to put a party upon inquiry shall operate as a notice to him, does not apply to a purchaser who claims under the statute of limitations. Clear and positive proof is, in such case, necessary, of notice that the title supposed to be acquired is bad, accompanied with proof of an intent to defraud the real owner.¹⁴ Some cases have gone so far as to hold that even if the action would be barred by an adverse possession of twenty years, yet such possession is negatived by the evidence, plea and the verdict.¹⁵

The question of adverse possession is usually considered a question for the jury to decide, and not a question of law for the court ; and their verdict should be brought up by a bill of exceptions, and cannot be reversed on the allegation that it is against evidence only. A bill of exceptions must not be on controverted facts ; but the jury alone are to draw the presumption from facts.¹⁶ This rule may be somewhat changed by the change in practice in different States since it was first laid down as set forth in the cases referred to. But the rule can be considered as general that a jury alone are to draw the presumption from the facts,—that is, the jury are to settle what the facts are, the court deciding the questions of law only. Of course, in a case that did not go to a jury, as is the case

¹⁴ *Clapp v. Bromagharn*, 9 Cow. 530; *Doe v. Prosser*, *Cowp. 217*; *Ricard v. Williams*, 7 Wheat. 59, *ante*.

¹⁵ 5 Cow. 74; 2 Bibb, 416; 12 Mass. 235; 4 Id. 378.

¹⁶ 2 Cal. 168; 1 East. R. 568; 9 Johns. 102; 11 Wheat. 276; 2 Bay, 483.

in a majority of actions for partition, it is then for the referee, or the court before whom the action is tried, to decide what the facts are ; then there is no jury, and the court has jurisdiction of all questions arising in the case, and must, in its decision, pass upon those questions.

The courts, as a usual rule, compel a party to bear the injuries caused to him by his own laches and negligence. Laches and neglect are discountenanced in courts of equity ; and even to such an extent, that, even where claims are not barred by the statute of limitations, a court will refuse to interfere after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice between the parties, when the original action may have become obscure by time, and the evidence may have been lost.¹⁷ The statute of limitations applies with equal force in cases of concurrent jurisdiction,—that is, cases in which a party may proceed either in law or in equity, and where the nature of such action may be an equitable action, or one of which courts of law would have jurisdiction.¹⁸ In some States the statute of limitations applies to all kinds of actions, whether legal or equitable, and, in such cases, is obligatory upon the courts in a suit in equity as in an action at law.¹⁹ The construction which the courts must place upon it, must be such as to bring forth as far as possible

¹⁷ *Harcourt v. White*, 28 Beav. 303; *McDonald v. White*, 11 H. L. Cas. 570; *Hunt v. Ellison*, 32 Ala. 173; *Wilson v. Anthony*, 18 Ark. 16; *Palmer v. Malone*, 1 Heisk. 549; *New Albany v. Burke*, 11 Wall. 96; *Badger v. Badger*, 2 Clif. 137; *Sherwood v. Sutton*, 5 Mas. C. C. 146; *Sloan v. Graham*, 85 Ill. 27.

¹⁸ *Teackle v. Gibson*, 8 Md. 70; *Crocker v. Clements*, 23 Ala. 296; *Bailey v. Carter*, 7 Ired. 282.

¹⁹ *White v. Sheldon*, 4 Nev. 280; *Rogers v. Brown*, 61 Mo. 187.

the intention of the Legislature enacting the law ; and it should be construed,—that is, if such a construction can be placed upon it,—in accordance with the usual meaning of the words of the statute.²⁰

Possession for more than twenty years, under an adverse title, bars relief in equity, unless complainants labor under some disability. Where a right of action has once accrued to a person laboring under a disability, and that disability is removed, or the person disabled dies, those to whom the estate descends, though then laboring under a disability, are not protected by the statute, and such successive disabilities are forbidden by the statute.²¹ An adverse possession of lands for twenty years operates as an equitable bar. An adverse possession that has continued for twenty years constitutes a complete bar in equity, wherever an ejectment would be barred, if the plaintiff possess a legal title.²²

The statute of limitations operates in causes of action existing in favor of one co-tenant and against another, to the same extent that it operates in actions between individuals where the relationship of co-tenancy does not exist. There has been a difficulty in fixing the exact time when the statute begins to run as between tenants. The general idea has been to treat co-tenants the same as if that relationship did not exist between them. And in the majority of cases the same rule relative to the limitation of time is applicable. The statute can hardly

²⁰ *Treadway v. Wilder*, 12 Nev. 108 ; *Wilcox v. Williams*, 5 Id. 206.

²¹ *Floyd v. Johnson*, 2 Litt. 112.

²² *Elmendorf v. Taylor*, 10 Wheat. 150 ; *Cook v. Arnham*, 3 P. Williams, 283. See 3 Atk. 225 ; 2 Jac. & Walk. 138.

run so as to debar one co-tenant of his right of partition against another. The exception to these cases is where there is an adverse possession upon the part of one or more of the co-tenants as against the others, which by lapse of time debars the others from asserting their right or claim to partition, and the adverse possession finally becomes the title to the premises. It can also apply between tenants in common upon questions of accounting. Where relief is demanded for rents and profits, use or occupation, with those elements entirely out of the case,—that is, there being no adverse possession and no questions arising in regard to rents and profits, use or occupation,—and leaving the only element in the case that of ownership, and the right to carve out and separate the ownership into individual parcels, or to sell the ownership in common, and divide the proceeds of such sale, the statute of limitations would not apply, as partition is a right given both by the common and statutory law, which right cannot be taken away, except where these adverse questions arise in the case, which debar the right of action, or the right of partition, until those questions shall have been settled. The statute of limitations does not commence running, in the case of tenants in common, until the relation of such co-tenants has been determined by partition, or until there has been a demand of some nature for an account, and the right to which the one making the demand is entitled, has been denied, or until the adverse possession actually commenced. It has been laid down as the rule that there cannot be such an adversary possession as to make the statute run, in reference to the right to an account of the profits, when it does not also run in reference to the right of possession, which can only be when there is an ouster, really made or presumed

from lapse of time.²³ It is not necessary to show when the right to the action of partition accrued, and it need not be set forth in the complaint, as the statute of limitations has no application to suits for partition, except so far as those suits may be governed by adverse possession or questions arising pertaining to rents, issues, profits, use or occupation, or other questions which might indirectly be affected by the statute of limitations.^{24 a}

The principal element of title is possession. Theoretically, title is the right of possession, and becomes a necessary element in the adjudication of all questions pertaining to lands, and it may be considered a sufficient statement that whoever is in possession of real property is so regarded by law as the owner thereof, that no one can dispossess him of the same, without showing some well-founded title of a higher and better character than such possession itself furnishes,—that is, that when one is in possession of lands and claims ownership thereto, the assumption is that he has the title to the land, unless a higher and better title can be produced.²⁵ Possession, however naked, may become an absolute title, and may become conclusive evidence of title under the operation

²³ *Freem. on Co-ten.* § 373; *Northcot v. Casper*, 6 Ired. 306; *Wagstaff v. Smith*, 2 Dev. 264; *Huff v. McDonald*, 22 Geo. 164; *Tarleton v. Goldthwaite*, 23 Ala. 358.

²⁴ *Jenkins v. Dalton*, 27 Ind. 78; *Freem. on Co-ten.* § 491.

^a For statutory provisions in regard to complaints in partition, see R. C. Ala. § 3498; Ark. Dig. 1884 ed. 4790; C. C. P. Cal. § 753; Col. C. § 281; Gen. L. Del. 528, § 8; Dig. Fla. McClellan's, 801; Ga. C. § 3996; Iowa C. § 3278; C. P. C. Kan. §§ 614, 615; Ky. C. § 499; R. S. Me. ed. 1883, p. 749, § 2; 2 Comp. L. Mich. § 7853; Gen. S. Mass. 1029, § 5; S. Minn. 803; Comp. L. Nev. § 1328; Gen. S. N. H. 567; S. Ohio, Williams', § 5756; L. Oregon, Deady, 255; C. Tenn. 4001; Gen. S. Vt. 1277; R. S. Tex. 1879, § 3466; R. S. Wis. § 3102.

²⁵ *Wood Civ. L.* 78, 126.

of that policy of the law, which, for the better state of society, and the peace of the community, will not allow a possession to be questioned after such possession shall have been enjoyed for so great a length of time as to render it unreasonable that such possession was held under anything different from a proper title originating from a sufficient ground and a legitimate source. Such a possession answered in common law as a sufficient seizin, and implied the seizin of the land in fee simple. In common law, seizin may be affirmed of any freehold estate, whether of inheritance or not. Statutes have to a certain extent changed the common-law principle, and made it more generally equal and equitable; but the elementary processes, which were the ruling elements in common law, yet remain and govern under the statutes. There can be but one actual seizin of land. This seizin may be owned as a co-tenancy, and that co-tenancy may be adverse to another ownership, or to another alleged co-tenancy in the same premises. Two individuals, or two sets of individuals, as co-tenants, cannot be actually seized of the same land claiming it by title adverse to each other. One or the other must be entitled to the right. If that remains unsettled, the hostile possession continuing, the law supposes and assumes that those hostile rights should be litigated, adjudicated and settled within a reasonable length of time. Upon the failure of the parties so to do, the statute of limitations by lapse of time will settle the question as to the seizin, ownership and right of possession in the premises. Disseizin and ouster mean very much the same thing as adverse possession.²⁶ When there is adverse holding, possession follows the ownership

²⁶ *Slater v. Rawson*, 6 Metc. 439; *Smith v. Burtis*, 6 Johns. 216.

in the land, and the right of possession is always in him who has the disputed title.²⁷

There is a seizin by deed, and a seizin in law. The difference between the two is, that in the case of the deed actual possession has been taken, is undisputed, and is an absolute established right by reason of the deed or grant. In the other, the title may be by heirship upon descent from an ancestor. In such case, there should be no possession until actual entry, or in other words, the possession would be vacant until an actual entry upon the premises by virtue of such heirship, or the seizin in law, may be result of the operation of time.²⁸ The doctrine of adverse possession rests to a certain extent upon the acquiescence of the owner ; but such acquiescence cannot be presumed, unless such owner has had notice of the possession. Actual knowledge to him of the possession must be shown to create an adverse possession to him. The decisions upon this question are not entirely consistent, but it may be considered as a somewhat well-established rule that knowledge of the possessory holding must be had before adverse possession actually exists.²⁹

The statute of limitations arises from prescription, and in consequence of which no action can be maintained, for the recovery of any real property, after an uninterrupted possession of a certain number of years. The statute of limitations is somewhat different from prescription, although arising to a certain extent therefrom. By the one, the right is acquired to an incorporeal hereditament ; but

²⁷ *Holley v. Hawley*, 39 Vt. 531.

²⁸ *Co. Litt.* 153; 2 *Pres. Ab.* 282.

²⁹ *Benje v. Creach*, 21 *Ala.* 151; 33 *Id.* 47; 2 *N. H.* 34; *Thomas v. Lynch*, 33 *Conn.* 330; *Alexander v. Polk*, 39 *Miss.* 755.

by the statute of limitations no positive or absolute right is acquired, but the remedy for the recovery of either corporeal or incorporeal hereditaments is absolutely taken away; and for that reason the statute of limitations may properly be called a negative prescription. An entry can only be made where there is an existing right of possession. When the right of possession is lost, the right of entry is gone. If the right of possession is lost by reason of lapse of time, the right of entry ceases at the losing of the right of possession; and the action for the recovery of such possession cannot be maintained. The statute of limitations has always received a favorable construction with a view to individual possession.

In the computation of time limited by the acts of limitation, it is to be computed at the time from which the right of entry accrues, or the time from which an action could be brought for the settlement or adjudication of the disputed rights.³⁰ The remedies on contracts or rights arising under the statute of limitations, or governed thereby, are regulated, and the practice is governed by the law of the place where the action is instituted, and not by the law of the place where the contract is made.³¹ The statute of the country or State in which a suit is brought may be pleaded in bar of a recovery on a contract or cause of action, made out or arising out of its political jurisdiction, and the statute of the place where the contract was made cannot be so pleaded.³² Of course, this rule would not be applicable in an action for the partition

³⁰ *Ang. on Lim.* 34; *Rhodes v. Smethurst*, 4 M. & W. 42; *Walling v. Wheeler*, 39 Tex. 480.

³¹ *Le Roy v. Crowninshield*, 2 *Mas. C. C.* 151.

³² *Hendricks v. Comstock*, 12 *Ind.* 238; *Fletcher v. Spaulding*, 9 *Minn.* 64; *Bigelow v. Ames*, 18 *Minn.* 527; *Pegram v. Williams*, 4 *Rich.* 219; *Orton v. Hunter*, 18 *W. Va.* 83.

of real estate, where the action was brought in any of the State courts, unless there should be a contract arising in the action pertaining to the use and occupation of the lands, or personal property owned by the parties to the action, as tenants in common or joint tenants.

CHAPTER XXXII.

VOLUNTARY PARTITION.

CO-TENANTS have at all times a right to make a division of their property held in common among themselves. The law will uphold such division, although the co-tenants may not have agreed upon a division that is equitable. If, after the voluntary partition shall have been made, it is acquiesced in by the co-tenants, and no fraud or collusion has been exercised by any of them as against the others, each understanding at the time the partition was made what he was doing, and none under the disability of infancy, lunacy or idiocy, the courts will hold the settlement and division as sacred, and those making it are bound thereby. This partition may be made by all of the co-tenants, or, on the other hand, they may carve out and set apart to one or more of the co-owners, his or her share. A partition is voluntary when accomplished by the mutual agreement of the co-tenants, one with the other. The rule laid down by Lord Coke is as follows: "If coparceners make partition, at full age and unmarried, and of sane memorie, of lands in fee simple, it is good and firme forever, albeit the values be equal; but if it be of lands entailed, or if any of the coparceners be of non sane memorie, it shall binde the parties themselves, but not their issues, unless it be equall; or if any be covert, it shall

bind the husband but not the wife or her heires, or if any be within age, it shall not bind the infant."¹

One method of division was by the coparceners selecting some of their friends to divide the land in severalty. In this selection it was customary for the eldest sister, when there was such, to have the first choice, and the other co-tenants would then choose, after she had made her choice, in the order of their seniority.² After the persons had been chosen among the friends of the co-tenants as aforesaid, then such person would proceed and make a division of the lands. It was supposed to be their duty to allot to each co-tenant as near as possible his or her individual share. Such practice, although not customary at present, is allowable. The court would consider the friends so chosen arbitrators or commissioners duly authorized to proceed with the division of the property, and the proper allotment of the same after such division. Such settlements should first be entered into by a written contract between the co-tenants. It would be better that such contract be duly executed under seal, and acknowledged as instruments are acknowledged for record. Then, after the allotment shall have been made, and each party shall have deeded to the other, so as to carry out the judgment of the arbitrators or commissioners so chosen, then all of the papers, the contract and the deeds, should be placed upon record.

Wives of co-tenants should join with their husbands in the conveyances, thus placing before the public, and especially future purchasers, a full record of the transaction, including the contract and the deeds, which would release all inchoate rights of dower. Co-tenants now appoint

¹ Co. Lit. 166 a.

² Litt. § 244; 2 Cruise, 394; Freem. Co-ten. § 349.

certain persons as arbitrators or commissioners, to make partition for them, though it is not generally understood that the report of such arbitrators or commissioners operates upon the final title, it being advisable to commence the transaction of voluntary partition by a contract between the co-tenants appointing such commissioners and by deeds of conveyance from one to the other, in accordance with the report made by such commissioners, and the recording of all the papers, thus making the title properly vested in each co-tenant of his or her share in severalty. The result of which is that the whole transaction operates upon the legal title and shows the consideration for what has been done. The law does not estimate any special formality to bring about a voluntary partition, but it has a right to estimate that the voluntary partition shall render the several titles clear in their respective owners after the allotment or choice shall have been made. The co-tenants themselves may divide the land in respective parcels, such as in their judgment they would believe to be about an equal division. If, after such division, they should fail to agree among themselves as to what particular parcels should be assigned to each co-tenant, they can agree to settle that question by lot, and, after its settlement, if then they enter into conveyances with each other in accordance with the division, and in accordance with the settlement by lot, such partition is binding and will be held sacred by the courts, providing the circumstances surrounding the co-tenancy were such that all of them could enter into the agreement. The co-tenants may by deed nominate and appoint certain persons as arbitrators to make the partition, and to submit to the award made by them. They can all join in a deed conveying the premises in question to certain arbit-

trators chosen by them, upon condition that the arbitrators reconvey the premises in parcels and in severalty to such co-tenants, which deed binds such co-tenants to abide by the conveyances made to them by the arbitrators. The latter is rather an unnecessary proceeding, as it multiplies papers, and, perhaps, might mix titles.

But it is well settled that a deed of partition may appoint as commissioners certain persons agreed upon by the co-tenants to make the division of the lands described in such deed, and to allot the same to the co-tenants according to their individual interests, the terms of such allotment to be specified in the deed. The deed may contain, in addition, words of release and conveyance by which the several co-tenants mutually, and for the consideration of the partition, release and convey to each other the parts which may be allotted by the commissioners, such deed to become in full force and take effect when the commissioners shall file their report, together with a map, in the office for recording deeds; such map showing the boundaries and indicating each of the several allotments. When such a map is filed with the report of the commissioners, the deed becomes effectual as a deed in partition and release, and vests in each co-tenant in severalty both the legal and equitable title to the premises allotted to him or her by the commissioners.³

The above methods may be considered by reason of custom and usage almost obsolete; but yet it is safe to say that when either of those methods have been fairly carried out, without fraud or collusion, that they will be upheld by the courts. Voluntary partition usually must

³ *Tewksbury v. Provizzo*, 12 Cal. 23.

be by deed. An exception to such cases is where the estate sought to be partitioned was an estate only for years, and in such a case the partition might be made without a deed and by contract.⁴ Tenants in common may make partition by parol, and continue the parol agreement by sufficient conveyances to each other. It may be by law as well as by parol. These principles are recognized in all the best elementary works upon the common law.⁵

The statute of frauds might make a parol partition void, when the same was not followed by conveyances of the property. According to many of the American cases, and a majority of the English authorities, partition may be affected by the statute of frauds, that interposing an obstacle to a valid parol partition. These decisions do not indicate that parol evidence cannot be presented to establish a division of the property among the co-tenants. In fact, a court of equity would consider that equity demanded that parol evidence should be admitted to show exactly the transactions between the co-tenants, and to show the respective rights of each co-tenant. Usually following a parol partition is the occupancy of each co-tenant of that portion of the premises agreed upon as his share. That occupancy may be for a short time, or for a great number of years. One co-tenant may improve that portion occupied by him—may bring it to a high state of cultivation, while another man may not improve his, and, in fact, may allow it to decrease in value by his neglect, the recorded title showing, notwithstanding the parol partition, that the co-tenants are owners of the whole of the premises as a co-tenancy. The court, in equity,

⁴ 2 Cruise 384; 13 Petersdorff Abr. 137.

⁵ 2 Cruise, 410; Co. Litt. 169; Litt. § 250.

when such a matter is brought before it, would undertake to so settle the relationship of the parties in and to the common land, that each should receive the share and portion occupied by him or her under the parol agreement, and would allow parol testimony to be produced, as there would be no recorded testimony in relation to the transaction, so that it could do equity to all the parties concerned.⁶ Long-continued occupation in severalty may be explained, and it may be shown to the court that such long-continued occupation existed by virtue of a parol partition made by the co-tenants. The jury in such cases might not be justified in finding that a valid partition had been consummated. If such should be the findings of the jury, the co-tenants, notwithstanding their long and continued occupation by reason of the parol agreement, would be regarded as owners of undivided parcels or moieties in the lands.⁷

Partition at all times is an action in equity. All matters pertaining to the common interests of the parties in the co-tenancy are before the court. The leaning of the court, when possible, is to recognize and sanction the parol partition by making a final decree carrying out and upholding such partition so far as within their power. If it is for the better interests of the parties and the greater equity in it, not to recognize and uphold such partition, the court is at liberty to decline to do so and to enter a

⁶ *Johnson v. Wilson, Willes*, 248; *Ireland v. Rittle*, 1 Atk. 541; *Whaley v. Dawson*, 2 Sch. & Lef. 367; *Allnatt on Part.* 130.

⁷ *Dow v. Jewell*, 18 N. H. 353; *Porter v. Hill*, 9 Mass. 34; *Wright v. Cane*, 18 La. Ann. 579; *Ballou v. Hale*, 47 N. H. 350; *Lacy v. Overton*, 2 A. K. Marsh. 442; *Medlin v. Steele*, 75 N. C. 154.

decree making a new and different allotment among the parties. Parol partitions are upheld in New York seemingly more frequently than elsewhere, notwithstanding the statute of frauds, when such partition is followed by possession taken and held by virtue thereof. Chancellor Kent, when Chief Justice of the Supreme Court, upon this subject said : "A parol division, carried into effect by possessions taken according to it, will be sufficient to sever the possessions, as between tenants in common whose titles are distinct, and where the only object of the division is to ascertain the separate possessions of each. This was so admitted by the court in the case of *Jackson ex dem. Van Denberg v. Bradt*, 2 Cai. 174."⁸ Freeman, in his able work, in commenting upon the remarks above quoted, as made by Chief Justice Kent, says : "But the case to which the chief justice thus referred does not, as reported, warrant the statement which he made; because the parol partition had been confirmed by a deed in which the co-tenants covenanted to abide by it." There is no doubt but that, where the title is admitted to have been in common, a parol partition, followed by possession, will be valid and sufficient to sever the possession; but where the whole right and title of the parties setting up such co-tenancy in common is denied, and, in fact, abandoned, the parol partition will not operate as a transfer of title.⁹

This principle, as set forth in *Jackson v. Vosburgh*, has since been frequently and consistently applied in New

⁸ *Jackson v. Harder*, 4 Johns. 212; 4 Am. Dec. 262.

⁹ *Jackson v. Vosburgh*, 9 Johns. 276. See 4 Johns. 212; 7 Wend. 141; 25 Wend. 436; 36 N. Y. 503; 20 Barb. 127; 6 Am. Dec. 276.

York.¹⁰ In South Carolina, the courts have ruled that if actual possession follows the parol partition, the parties would be bound thereby.¹¹ This rule seems to have been conceded in Missouri at one time.¹² But there the idea is similar to that in Virginia, that coparceners may mark and establish the dividing line between them, and prove it by other competent evidence than the deed ; and that, from the time of the marking out and establishing of the lines, the co-tenants will be seized in severalty.¹³ In Ohio, the courts are not apt to disturb a parol partition consummated by possession, there being a fair division of the property ; and they will not disturb it after a lapse of a number of years, although some of the parties were infants.¹⁴ In Texas, a parol partition is considered valid,¹⁵ and the decision is based upon the ground that there is a material difference between the statute of frauds of that State and the English statutes.¹⁶

The statute of frauds is an element that must be generally considered. There may be a distinction between the partition of lands and the sale, which distinction is pointed out by some of the courts in upholding a parol partition upon the ground that the partition does not

¹⁰ *Mount v. Morton*, 20 Barb. 138 ; *Otis v. Cusack*, 43 Barb. 549 ; *Conkling v. Brown*, 57 Barb. 265 ; *Wood v. Fleet*, 36 N. Y. 499 ; *Ryerss v. Wheeler*, 25 Wend. 434 ; *Wildey v. Bonney*, 31 Miss. 652 ; *Pipes v. Buckner*, 51 Miss. 848.

¹¹ *Slice v. Derrick*, 2 Rich. 629 ; *Haughbaugh v. Honald*, 3 Brev. 98 ; 5 Am. Dec. 548.

¹² *Bompart v. Roderman*, 24 Mo. 398. See 8 Mo. App. 434.

¹³ *Coles v. Wooding*, 2 Pat. & H. 197 ; *Bolling v. Teel*, 7 Va. L. J. 604. See *Manly v. Pettee*, 38 Ill. 131 ; *Tomlin v. Hilyard*, 43 Ill. 300 ; *Hazen v. Barnett*, 50 Mo. 507.

¹⁴ *Piatt v. Hubbel*, 50 Ohio, 245.

¹⁵ *Stuart v. Baker*, 17 Tex. 420 ; *Dement v. Williams*, 44 Id. 158.

¹⁶ *Hunter v. Morse*, 49 Tex. 219 ; *Compton v. Matthews*, 22 Am. Dec. 167. See 89 Ill. 370.

transfer the title of the parties so much as it assigns or apportions it,—that is, the title remains in the co-tenants, but the title and right of possession is divided.¹⁷ A mere unexecuted agreement for partition, or an agreement which is incapable of being executed because it cannot be followed by possession in accordance with it, is not binding upon any one.¹⁸ It is somewhat well settled that a parol partition will not operate to transfer title.¹⁹

Parol partition does not destroy co-tenancy, although fully executed and the parties hold possession under it. Mr. Washburn, in his work upon real estate, declares, in general terms, that "no parol partition can be effectual, unless accompanied by deeds from one co-tenant to the other, inasmuch as the Statute of Frauds applies to such cases." Mr. Browne, in his Treatise on the Statute of Frauds, announces, as his conclusion, that "the decided weight of authority in the United States seems to favor the English view of this question, and to be opposed to allowing a verbal partition to be effectual, even to sever the possession of tenants in common." It does not seem that the rule should be carried so far as that laid down by Browne. Equity ought to allow a severance of the possession by parol, even though it does not allow a severance of the title in the same way. The possession of the co-tenants ought not to be disturbed after it has been entered into pursuant to a verbal agreement and acquiescence for a considerable length of time.²⁰

¹⁷ *Moore v. Kerr*, 46 Ind. 470; *Brown v. Wheeler*, 17 Conn. 345; 44 Am. Dec. 550. See *Hauk v. McComas*, 98 Ind. 460, *Shepard v. Rinks*, 78 Ill. 188.

¹⁸ *Woodbeck v. Wilders*, 18 Cal. 136; *Lauterman v. Williams*, 55 Cal. 600.

¹⁹ *Browne on Statute of Frauds*, § 70; 9 Johns. 276, 290; 6 Am. Dec. 276.

²⁰ 1 *Washb. on Real Prop.* 430; *Freem. on Co-ten.* 401.

Freeman, in his remarks upon the enforcement of parol partition, says : “ But whatever effect may be conceded at law to parol partitions, we think it quite certain that, when executed by taking possession thereunder, they will be recognized and enforced in equity, particularly when such a partition and the possession based upon it have been mutually acquiesced in by the parties for a considerable period. ‘ I do admit a parol agreement of long standing, acknowledged by all the parties to have been the actual agreement and accordingly put in execution, will be established by this court, where it appears that the persons who made such an agreement had a right to contract, and I will not, at fifty-three years’ distance, suffer either of the parties to controvert the equality of the partition at the time it was made.’ It is true, that in some cases in which equity has protected rights based upon parol partitions, possession had been taken and continued under such partition for a long period of time, or one of the parties, acting upon his faith in the partition, has made valuable improvements upon the property allotted to him. But, while either of these circumstances may justly be regarded as entitled to great consideration, we can see that neither is essential to warrant the interposition of the court, and that a court of equity will compel specific performance of a parol partition, as of any other parol contract relating to lands, whenever it has been carried into execution by the parties.”²¹

According to the Mexican and Spanish laws, parol

²¹ Ireland *v.* Rittle, 1 Atk. 542, *ante*; Kennedy *v.* Kennedy, 43 Pa. St. 417; Massey *v.* McIlwain, 2 Hill Ch. 424; Pope *v.* Henry, 24 Vt. 560; Goodhue *v.* Barnwell, Rice Eq. 236; Hazen *v.* Burnett, 50 Mo. 507, *ante*; Tomlin *v.* Hilyard, 43 Ill. 302, *ante*; Eaton *v.* Tallmadge, 24 Wis. 221; Buzzell *v.* Gallagher, 28 Wis. 678.

partitions were valid. But in order to uphold such a partition under the Spanish law, as well as under the common law, it must appear satisfactorily not only that there was an agreement duly made, but that such an agreement was fully executed by following the same by possession in severalty of the premises.²²

The most usual manner of accomplishing a voluntary partition is by means of deeds and releases between the co-tenants. When the division of lands has been accomplished in this way, and without fraud or collusion, there being no infants interested, it must necessarily be safe. When partition shall have been effected by mutual deeds between the co-tenants, those deeds must be construed together as one instrument, taking into consideration all the circumstances surrounding them, and for which they were made.²³ To make such a partition perfect, the wives of husbands who are co-tenants should join in the mutual deeds, releasing their inchoate rights of dower in the property. Unless they should join with their husbands certain equities would remain in the premises to the wives.²⁴ No warranty, arises from voluntary partition. It would not be proper to consider that the respective tenants in common, who have deeded to each other for the purpose of dividing the lands, were to be held by the covenants of seizin in the deed, providing there should be a failure of the titles in whole or in part. The co-tenants take from their ancestor what their ancestor had at his death. They can have no better title than that

²² *Long v. Dollarhide*, 24 Cal. 222; *Lynch v. Baxter*, 4 Tex. 431; 51 Am. Dec. 735.

²³ *Allnatt* on Part. 131; *Rountree v. Denson*, 59 Wis. 522; 18 N. W. R. 518.

²⁴ *Eaton v. Tallmadge*, 74 Wis. 223, *ante*.

held by him, when that title comes to them by inheritance. When the title comes to the co-tenant by grant they are each entitled, as against the grantor, to such equities as may arise by reason of the grant and the warranties therein contained. Those equities would naturally remain after the voluntary partition had been effected. But in deeding to each other, imperfections of title cannot be divided up in such a way, so that one would have a right of action therefor as against the other by reason of the covenants and warranties contained in the conveyances. In New York, a parol partition of the interests of several co-heirs can only give to each the rights and interests, either vested or contingent, which the others then had in the lands at the time the same were set-off in severalty.²⁵

Notwithstanding it is advisable for the wife to join with her husband co-tenant in the deed of conveyance made by him, the rule is laid down that if her husband be a joint tenant he has not such a seizin that she can acquire any right to dower, unless the joint tenancy in some manner should be converted into a tenancy in common. This rule, of course, is based upon the fact that in the joint tenancy there is a survivorship, that the husband did not die seized of the premises, but at his death his surviving joint tenant becomes seized, and, therefore, the wife has no right of dower.²⁶ In equity, when the husband is compellable by legal proceedings to make parti-

²⁵ Rawle on Cov. Title, 474, 475; *Weiser v. Weiser*, 5 Watts, 280; 30 Am. Dec. 313; *Picot v. Page*, 26 Mo. 422; *Dawson v. Lawrence*, 13 Ohio, 546; 42 Am. Dec. 210; *Carpenter v. Schermerhorn*, 2 Barb. Ch. 322, *ante*; *Beardsley v. Knight*, 10 Vt. 185; 33 Am. Dec. 193; *Rountree v. Denson*, 59 Wis. 522, *ante*; *Morris v. Harris*, 9 Gill, 26; *Rogers v. Turley*, 4 Bibb, 356; *Venable v. Beauchamp*, 28 Am. Dec. 74.

²⁶ *Patterson v. Lanning* 36 Am. Dec. 154.

tion with his co-tenants, it is conceded that he may do voluntarily that which the law could oblige him to do, and that, when voluntary partition has been perfected, the dower interest of the wife in that undivided portion of the premises belonging to her husband attaches itself to that divided portion of the premises allotted to her husband by the voluntary act of the co-tenants. This is upon the principle that the wife is in no way wronged, and that, if an equitable and fair division has been made, without fraud or collusion, then by confining her to the equal share which her husband takes, she will have all the dower given to her by law.²⁷ If the husband dies pending a partition suit, to which his wife is not made a party, the suit can only be revived or continued against the widow, as to her right of dower in the premises, by the original bill in the nature of a bill of revivor and supplement. The purchaser of premises sold under a decree for partition takes the same subject to the right of dower of the wife of one of the co-tenants in common, unless the wife was a party to the suit; but where an actual partition is made, the wife's dower will attach upon the portion of the premises allotted to her husband.²⁸

A married woman may be interested in the lands directly,—that is, she may be a tenant in common, or a joint tenant with the others. By the married woman's act of New York State, the wife may transact business in regard to her separate property, as if she were a *feme sole*. She can deal with her separate property without any restric-

²⁷ *Lee v. Lindell*, 22 Mo. 203, *ante*; *Potter v. Wheeler*, 13 Mass. 506, *ante*; *Wilkinson v. Parish*, 3 Paige, 658.

²⁸ 3 Paige, 652, 658; *Totten v. Stuyvesant*, 3 Edw. Ch. 503, *ante*; *Potter v. Wheeler*, 13 Mass. 506, *ante*; *Mosher v. Mosher*, 32 Me. 414; *Rank v. Hanna*, 6 Ind. 20.

tions, or without laboring under any disabilities, as any other co-tenant.

In some States, where the law pertaining to the rights of married women is not so broad and liberal as in New York, then the common-law ideas would prevail to their full extent, unless the common law should be relieved in part or in whole by statutory enactment. A conveyance made by a married woman must be acknowledged before some officer authorized to take acknowledgments, and she should be acquainted with its contents, and, unless the statute has decreed otherwise, such acknowledgment should be upon an examination private from her husband, and without his hearing. The officer questioning her has to know whether the acknowledgment is made without fear or compulsion upon the part of her husband. This rule in regard to taking the acknowledgment does not prevail in New York,—the more civilized rule prevailing, allowing the wife to be questioned in regard to the acknowledgment the same as the husband, and no more. If a conveyance made by a married woman is intended to operate as a partition, the conveyance cannot be questioned after possession shall have been taken and the deed given, upon the ground that the examination at the time of the acknowledgment before the officer was within the hearing of her husband.²⁹

In those States where the statutes have not changed the law as it formerly existed, where husband and wife hold property in co-tenancy they are joint tenants, or, perhaps, more correctly speaking, tenants by entirety. An action of partition cannot be maintained between them;

²⁹ *Wetherill v. Mecke*; *Brightly*, 140; *Hardy v. Summers*, 32 Am. Dec. 167; *Calhoun v. Hays*, 42 Id. 275; *Bryan v. Stump*, 56 Id. 139; *Bumgardner v. Edwards*, 85 Ind. 126.

and there is some question as to whether a voluntary partition made by them would be legal, each deeding to the other the parcels or parts of the lands held in entirety, as agreed upon by them. They could deed the property held by them as tenants by entirety, to some third person, each joining in the conveyance. When that is done, the premises lose the character of holden by entirety, and the title rests in one individual. Then that individual can convey back to the husband and wife in severalty, so as to make voluntary partition of the premises.³⁰

Voluntary partition in case of infancy may be made binding by the infant entering upon the premises, and acquiescing thereto, after he shall have become of age. He is compellable under the law to make partition. And, in some instances, courts have held that he is bound by the partition made during his infancy, providing the voluntary partition so made was in good faith, fairly done, and without fraud or collusion, and all the equities belonging to the infant had been set apart to him.³¹ Notwithstanding the Statute of Frauds, it has always been considered that an agreement in writing to make partition will have the same effect, in equity, as an actual partition in law.³² It hardly seems that such an agreement would perfect the title in severalty in the respective co-tenants, but, if necessary, equity will enforce such an agreement, and a

³⁰ *Frissell v. Rozier*, 19 Mo. 448; *Vin. Abr. tit. "Partition,"* (D. subd. 13); citing *Arg. 2 Le. 25*; *Pafch 30 Eliz. B. R.*, in case of *Ross v. Morris*.

³¹ *Hemich v. High*, 2 Watts, 159; *Calhoun v. Hays*, 42 Am. Dec. 275, *ante*; *Townsend v. Downer*, 32 Vt. 183; *Williard v. Williard*, 56 Pa. St. 119; *Estabrooks v. Harris*, 2 Allen, 42; *Allnatt Part. 29*.

³² 2 *Cruise*, 410.

decree or judgment of the court will be entered perfecting the title as per the agreement.³³

Where tenants in common of lands, including a town road passing through the same, made a partition by mutual deeds of release, in which the bounds of the tracts so released were described as beginning at, and running by, and on the side of, the road, the road itself is not included in the partition, but the parties still remain tenants in common thereof, subject to the public easement.³⁴ By the Massachusetts decision, the law will not presume a deed merely from the several possession of the tenants by reason of the statute of frauds.³⁵ These decisions do not go so far as to hold that a court of equity could not enforce the specific performance of the parol or verbal agreement, the same having been followed by possession. The courts of New York have laid the rule somewhat different: that a parol partition between tenants in common, accompanied by actual possession in accordance therewith, will bind the parties and those claiming through or from them.³⁶ Undoubtedly, this, the better rule, is upon the principle that partition is an action in equity; that all the equities are before the court, and that, in equity, the court has a right to recognize the parol partition and the possession following thereafter, and to agree that such agreement shall be specifically performed,

³³ *Pringle v. Sturgeon*, Litt. Sel. Cas. 112; *Fleming v. Kerr*, 10 Watts, 444; *Emeric v. Alvarado*, 64 Cal. 579. See 21 Cal. 69; 11 Humph. 389; *Douglass v. Harrison*, 2 Sneed, 382; *Gates v. Salmon*, 46 Cal. 361.

³⁴ *Sibley v. Holden*, 10 Pick. 249.

³⁵ *Porter v. Perkins*, 5 Mass. 233; *Whitney v. Holmes*, 15 Mass. 152.

³⁶ *Otis v. Cusack*, 43 Barb. 546, *ante*.

and to make judgment or decree settling the title in and to the respective occupants of the several parcels.³⁷

A parol partition of lands, followed by a possession and occupation in conformity to it, for a period of thirty years, is valid and operative. For it has been repeatedly decided that a parol partition, carried into effect by possessions and occupation in conformity thereto, will be binding between the co-tenants in common, whose titles are distinct, and the only object of the division is to ascertain the separate possessions.³⁸ In an action against a stranger to the title, such partition will be enforced, although made by the grantee of a tenant by the courtesy; during the continuance of the life estate, partition is good. A parol partition, carried into effect by possession taken according to it, is sufficient to sever the possessions as between tenants in common, whose titles are distinct, and when the only object of the division is to ascertain the separate possessions of each. The New York statutes protecting the property of married women authorize them to make partition, with the assent of their husbands, when they have an estate in lands.³⁹ The later laws relative to married women allow them to make partition without the assent of their husbands, as they allow them to deal with their individual property the same as if single. Deeds given by the co-tenants of the respective parcels, which they hold in severalty, would, undoubtedly,

³⁷ *Wood v. Fleet*, 36 N. Y. 499, *ante*; *Jackson v. Harder*, 4 Johns. 200. See 5 Wend. 54; 7 Id. 141; 25 Id. 436; 19 Id. 297; 36 N. Y. 502; 20 Barb. 127; 43 Id. 549.

³⁸ *Ryerss v. Wheeler*, 25 Wend. 434. See 4 Johns. 202; 9 Id. 270; 14 Wend. 619; Co. Litt. 169; Com. Dig. "Parceners," 5; 4 N. Y. 262; 45 Am. Dec. 377; 18 N. H. 353.

³⁹ *Hunt v. Johnson*, 19 N. Y. 297; citing *Jackson v. Harder*, 4 Johns. 202; *Jackson v. Bradt*, 2 Cai. 174, *ante*.

convey title to the grantees named in such deeds. Such conveyances would be conclusive evidence of a partition previously agreed on ; and the co-tenants, by their acts, causing others to believe that it was made, would be estopped from denying the existence of such partition. Such conveyances, made separate, and at successive times, equally establish the fact of partition previously agreed to.⁴⁰ ^b

If a tenant in common, following a parol partition, erects buildings upon that portion of the premises of which he is in possession by virtue of the parol partition, a lien will attach thereto in favor of the contracting party, who has built or furnished the material therefor ; and the co-tenant who is not a party to the contract with the mechanic, and who has no interest in the work done, is not liable under the contract; nor is his share of the property subject to the builder's lien.⁴¹ Two tenants in common make partition of their lands and execute to each other releases in fee. One of them has only a life-estate, but after the division the fee descends to him, and he subsequently sells and conveys in fee the part allotted to him in the partition. Such conveyance carries with it title. This confirms the partition, so that the person who had the life-estate cannot claim any interest in that part

⁴⁰ Mount *v.* Morton, 20 Barb. 123, *ante*; citing 4 Johns. 212; 9 Id. 276; 7 Wend. 136; 14 Id. 619; 25 Id. 434; 4 Hill, 468; 4 N. Y. 257.

^b Presumptions are only indulged in where there are no other means of ascertaining the facts. 3 Blacks. Comm. 371, Oxford ed. 1773; 14 E. L. & Eq. R. 223; Black *v.* Wright, 9 Ired. 447; Jackson *v.* Mancius, 2 Wend. 357.

⁴¹ Otis *v.* Cusack, 43 Barb. 546; citing Smith *v.* Brady, 17 N. Y. 173. See 9 N. Y. 435; 21 Barb. 520; 2 E. D. Smith, 543; 3 Hill, 215.

allotted to his co-tenant.⁴² A parol partition of real estate by tenants in common, followed by exclusive possession, are acts of ownership by each tenant respectively, and are valid and binding upon their heirs.⁴³ Cases in Massachusetts, Pennsylvania and Maine, hold, that no parol partition can be effectual unless accompanied by deeds from one tenant to the other, inasmuch as, in the opinion of the courts of these States, the statute of frauds applies in such cases.⁴⁴ Washburn, after setting forth the principles laid down in the cases last cited, says: "But although a parol partition between tenants in common may not, for the reasons stated, affect the legal title of the several owners; where it is followed by possession in conformity with such partition, it will so far bind the possession as to give each co-tenant the rights and incidents of an exclusive possession of his particular part." This principle is upheld in other States besides New York.⁴⁵

No parol partition of land can avail, especially against a married woman, unless it be sanctioned by possession sufficient to give title under the statute of limitations, or by such lapse of time as justifies a presumption *omnia esse rite acta*.⁴⁶ This rule is not the prevailing one at present, but the rule above referred to, wherein equity follows the possession in severalty of the co-tenants, giving to his or her the share allotted by the verbal partition. A parol

⁴² *Baker v. Lorillard*, 4 N. Y. 257.

⁴³ *Wood v. Fleet*, 36 N. Y. 499, *ante*.

⁴⁴ *Porter v. Hill*, 9 Mass. 34, *ante*; *Porter v. Perkins*, 5 Id. 232, *ante*; *Snively v. Luce*, 1 Watts, 69; *Grats v. Grats*, 4 Rawle, 411; *Gardiner Mfg. Co. v. Heald*, 5 Me. 384; 1 Washb. Real Prop. 450.

⁴⁵ *Piatt v. Hubbell*, 5 Ohio, 243; *Keay v. Goodwin*, 16 Mass. 1; *Slice v. Derrick*, 2 Rich. 627.

⁴⁶ *Jones v. Reeves*, 6 Rich. 132.

partition between tenants in common, carried into effect by possession taken by each party of his share, is valid and binding upon the parties, and a court of equity will, upon proper bill filed, compel conveyance to each of the part partitioned to him by the other.⁴⁷ But where one of the co-tenants is not *sui juris*, takes no part in the oral partition, has no provision made for him, is not present, and receives no purpart or an equivalent, he is not bound by the partition. Such a partition is, nevertheless, binding upon each of the co-tenants who participated in it *sui juris* and received a purpart, or its equivalent—at least as between himself and the others who participated in like manner.⁴⁸

⁴⁷ *Gage v. Bissell*, 8 West. R. 54. See *Hyde v. Heath*, 75 Ill. 381; *Gage v. Reed*, 104 Ill. 509.

⁴⁸ *Mellon v. Reed*, 6 Cent. R. 413. See *Calhoun v. Hays*, 8 Watts & S. 132.

CHAPTER XXXIII.

COLOR OF TITLE.

AN apparent title, founded upon a written instrument,—such as a deed, levy of execution, or a decree of court,—is what is termed in law a color of title. To give color of title, the conveyance must be good in form, and profess to convey the title, and be duly executed.¹ A very common and general definition of the term color of title is, “that which in appearance is title, but in reality is no title.” A deed or survey of land placed upon a record where land titles usually are recorded, whereby notice is given to the true owner and all the world that the occupant claims title. It is a notice that he claims the title under such deed, and such deed is his color of title.²

A paper having a grantor and a grantee named in it, and describing certain real estate, purporting to convey the real estate therein described by some sufficient words of conveyance, gives color of title to the land set forth in such paper or instrument.³ The claim may be entirely inadequate, and it may be founded upon such instrument, deed, levy, or decree, as would be entirely incompetent to carry the true title, or the grantor named in the written instrument purporting to convey the title, may be entirely

¹ 3 Wait Act. & D. 17; 35 Ill. 394; 38 Ill. 327; 4 Mart. 224.

² Hodges *v.* Eddy, 38 Vt. 327.

³ Brooks *v.* Bruyn, 35 Ill. 394.

incompetent to convey the land therein set forth, yet such instrument, deed, levy, or decree, followed by possession, is an apparent color of title, and must be usually recognized as such by the courts.⁴ Such a claim under such inaccurate paper or instrument, by force of the statute of limitations, would in time ripen into a complete title, when the premises had been held and possessed by virtue of the color of title for a sufficient length of time, as prescribed by the statute of limitations for that purpose. This would be adverse possession under color of title, ripening into actual title, such a title as would thereafter by conveyance convey the seizin of the property to the grantee. The rule is somewhat general that to give color of title the instrument or conveyance, under which the same is claimed, must be good in point of form, and must profess to convey the entire title, and be properly executed. It would not be wisdom in the law to assume that a person could enter into possession of premises under any kind of paper or instrument, and claim that that instrument is a color of title to the premises, and should thereby claim such title. The instrument under which the claim is made must, so far as the face of the instrument is concerned, comply with the law regulating the same.⁵

A title which is void upon its face, or discloses facts which show that the person purporting to convey title had none, is absolutely void, and cannot be implied into being a color of title. Thus, where a defendant offered a deed in evidence, purporting to be a deed from an officer authorized to sell for taxes, and the deed upon its face

⁴ *Edgerton v. Bird*, 6 Wis. 527.

⁵ *La Frombois v. Jackson*, 8 Cow. 589; *Dufour v. Campane*, 11 Mart. 715; *Frigue v. Hopkins*, 4 Mart. (N. S.) 224.

showed that the officer had not complied with the requisitions of the statute, this was a void deed, made in violation of law, and did not bring it within the statute of limitations. The deed purported that he must have a connected title from some one authorized to sell, and in the case to which we referred, the officer was not so authorized. The deed was not, therefore, admissible in evidence, and was not, and could not be considered as color of title.⁶ The instrument relied upon as being the paper or instrument upon which the title is founded, must purport on its face to convey title to the grantee. Unless such instrument does so purport to convey title, no title can be claimed under it; and the grantee cannot by reason of such defective paper even claim a right to the possession of the premises.⁷

If a person enters upon premises under proper color of title, the possession will be adverse, however groundless the supposed title may be. The fact that the person is in possession, and that he is in possession by virtue of a color of title, is the test. A deed is not essential to constitute an adverse possession; and if there be a deed, it need not be produced; or if, on production, it proves to be defective, this does not prevent the possession from being adverse. Every possession is presumed to be adverse, until the contrary is shown. This may be rebutted by receiving a lease, paying rent, acknowledging the title to be in another, or showing that the possessor,

⁶ *Moore v. Brown*, 11 How. U. S. 414; *Simmons v. Lane*, 25 Ga. 178; *Marsh v. Weir*, 21 Tex. 97. See 13 How. U. S. 478; 1 Sawyer, 20; *Hemp*, 643.

⁷ *Bride v. Watt*, 23 Ill. 507; *Brooks v. Bruyn*, 35 Ill. 392, *ante*; *Childs v. Shower*, 18 Iowa, 261; *Jackson v. Frost*, 5 Cow. 346; *Jackson v. Adams*, 7 Wend. 367; *Doe v. Redfern*, 12 East. R. 96; *Colgan v. Pellens*, 2 Cent. R. 254.

in fact, entered without a claim or color of title. If he entered upon the premises under color of title,—that is, having such instrument, deed, paper or decree, as would upon its face give a right to claim the title to the premises, then he is not only holding the premises by reason of adverse possession, but under color of title.⁸ A person entering upon lands and occupying them as mere intruder is under no obligation to pay the taxes that may be assessed upon the land ; and he may acquire title to the land under a tax deed adverse to the former owner or his trustees. Such intrusion upon the premises was subservient to the legal title, and no ouster could be presumed in favor of such naked possession.⁹

The general rule, as cited or quoted in the case of *Link v. Doerfer*, is : " The principle, however, that possession must in its inception be adverse and continue so, is not well understood. In those cases in which that observation occurs, nothing had happened to change the character of the first possession and that was considered as denoting *quo animo* the possession was held after the first entry. If one enter on land without any claim or title or color of title, the law adjudges the possession to be in subservience to the legal holder, and no length of possession will render the holding adverse to the title of

⁸ *La Frombois v. Jackson*, 8 Cow. 589; citing 12 Johns. 365; 11 Wheat. 415; 12 Ves. 266; 9 Johns. 180; 18 Id. 44; 1 Cow. 285; 5 Wheat. 124; 7 Wheat. 120. See 45 Wis. 391; 33 Cal. 676; 63 Mo. 247; 29 Ind. 72; 42 Wis. 395; 44 Wis. 129.

⁹ *Link v. Doerfer*, 24 Am. R. 417; 42 Wis. 391; *Jackson v. Waters*, 12 Johns. 365; *Jackson v. Thomas*, 16 Id. 293; *Jackson v. Camp*, 1 Cow. 605; *Ricard v. Williams*, 7 Wheat. 59; *Society, etc. v. Pawlet*, 4 Pet. 480; *Bradstreet v. Huntington*, 5 Id. 402; *Jackson v. Porter*, 1 Paine, 457; *Markley v. Amos*, 2 Bailey, 603; *Blackwood v. Van Vleit*, 30 Mich. 118; *Blakely v. Bestor*, 13 Ill. 708; *Moss v. Shear*, 25 Cal. 38; *Bowman v. Cockrill*, 6 Kan. 311.

the owner ; but if a man enters on land, without claim or color of title, and no privity exists between him and the real owner, and such person afterwards acquires what he considers a good title, from that moment his possession becomes adverse." The recording of a taxed deed, after such entry, was equivalent to a new entry, under claim of title ; and from thence his possession was adverse.¹⁰

The principles stated in the above rule quoted, have been recognized in a great number of cases.¹¹ Where two or more persons are in possession of land,—that is, what might be termed a mixed possession,—the inference of the law is that he who has the best title is the rightful possessor of the premises.¹² If neither of the parties, thus having an interest in the mixed possession of the land, can show any legal title, the courts will hold that he who had the first, the prior possession, will have the better right.¹³ Prior possession is sufficient, when under color of title, to support the right of the party having such prior possession and his grantee to eject one who has only a naked possession.¹⁴ A person who has been evicted from the possession of lands, can, without showing any title in himself, maintain an action for them, against the grantee

¹⁰ Pepper *v.* O'Dowd, 39 Wis. 538.

¹¹ Woodward *v.* McReynolds, 2 Pin. 268 ; Edgerton *v.* Bird, 6 Wis. 527, *ante* ; Smith *v.* Lewis, 20 Wis. 350 ; Bassett *v.* Welch, 22 Id. 175 ; Jones *v.* Davis, 24 Id. 229 ; McMahon *v.* McGraw, 26 Id. 614 ; Quinn *v.* Quinn, 27 Id. 168 ; Frentz *v.* Klotsch, 28 Id. 312 ; Whitney *v.* Gunderson, 31 Id. 359.

¹² Cheney *v.* Ringgold, 2 Harr. & J. 87 ; Page *v.* O'Brien, 36 Cal. 559.

¹³ Shultz *v.* Arnot, 33 Mo. 172 ; Shumway *v.* Phillips, 22 Pa. St. 151 ; Jackson *v.* Hazen, 2 Johns. 22 ; Law *v.* Wilson, 2 Root, 102.

¹⁴ Bates *v.* Campbell, 25 Wis. 613 ; Newman *v.* Cincinnati, 18 Ohio, 323 ; Dale *v.* Faivre, 43 Mo. 556 ; Keane *v.* Cannovan, 21 Cal. 291.

of his disseizor, who is also without title. One who is a purchaser at a sale under the foreclosure of a mortgage made by a party disseized, while in possession, can assert the same rights as the disseizee, and recover upon his possession, without proving that he has ever been in possession himself.¹⁵

In the case of *Smith v. Lorillard*, cited by Justice Emott in his opinion in *Clute v. Voris*, Chancellor Kent upon this subject said: "A prior possession, short of twenty years, under a claim or assertion of right, will prevail over a subsequent possession of less than twenty years when no other evidence of title appears on either side." Justice Emott adds: "The rule is explained as requiring that the prior possession of the plaintiff should not have been voluntarily relinquished, without the *animus revertendi*, and the subsequent possession of the defendant should have been acquired by mere entry without any lawful right. All the facts which the doctrines of this judgment require would be found in the case at bar, and the judgment would apply precisely to this case, if it were between Broad and the defendant as grantee of Badeau. . . The first or oldest possession which can be shown affords a presumption which can only be overreached by proof of title, or a subsequent adverse holding long enough to bar an entry."

A mortgagee can acquire title to premises through a purchase at his own sale, and such title is good until the same shall have been set aside for sufficient reasons by a

¹⁵ *Clute v. Voris*, 31 Barb. 511; citing *Bateman v. Allen*, Cro. Eliz. 437; *Allen v. Rivington*, 2 Saund. 111; *Jackson v. Hazen*, 3 Johns. 22; *Smith v. Lorillard*, 10 Id. 338; *Jackson v. Rightmyre*, 16 Id. 325; *Jackson v. Hubble*, 1 Cow. 613; *Jackson v. Walker*, 7 Id. 637; *Whitney v. Wright*, 15 Wend. 171; 52 Hen. III. c. 30.

court having proper jurisdiction.¹⁶ A purchase at a sheriff's sale is a color of title.¹⁷ One may be in possession of lands under color of title by virtue of a deed received by him executed by one who had a power of attorney so to do. A deed purporting to be executed by virtue of a power of attorney from the owner of the land, which power is not proved, affords sufficient color of title on which to found an adverse possession, if there has been a good constructive occupation under it.¹⁸ It may be regarded as settled upon authority, that however wrongful or fraudulent the possession, or defective the title, an entry under claim of exclusive title, founding such claim upon a written conveyance, accompanied by a continued possession of twenty years, constitutes an effective adverse possession. A purchaser of premises at a tax sale, followed by possession, gives sufficient color of title to sustain an action in ejectment.¹⁹ An entry into possession of a tract of land, under a deed containing specific metes and bounds, gives a constructive possession of the whole tract, if not in any adverse possession; although there may be no fence or inclosure around the tract. To constitute actual possession, it is not necessary that the premises possessed should be inclosed by a fence. The assumption that there can be no possession to defeat an adverse title, except in one or other of these ways,—that

¹⁶ *Hawkins v. Hudson*, 45 Ala. 482.

¹⁷ *Jackson v. Graham*, 3 Cai. 188; *Jackson v. Davis*, 18 Johns. 7; *Young v. Algeo*, 3 Watts, 223; *Davis v. Evans*, 5 Ired. 525; *Brock v. Yongue*, 4 Ala. 584; *Matney v. Graham*, 59 Mo. 190; *Jackson v. Newton*, 18 Johns. 355; *Burkhalter v. Edwards*, 16 Ga. 593.

¹⁸ *Munro v. Merchant*, 28 N. Y. 9; *Doe v. Phelps*, 9 Johns. 169; *Doe v. Campbell*, 10 Id. 479.

¹⁹ *Dillingham v. Brown*, 38 Ala. 311; *Prescott v. Nevers*, 4 Mas. 326; *Minot v. Brooks*, 16 N. H. 376.

is, by an actual residence, or an actual inclosure,—is a doctrine which cannot be reconciled with the principle of the better authorities.²⁰

A deed from a person not in possession, or not shown to be the owner of the premises, establishes no title whatever. Possession, unaccompanied by a paper title, requisite to furnish the presumption of ownership, must be actual possession.²¹ If no person be in actual possession of property, recovery could not be had, upon proof that the premises were conveyed to the plaintiff, at some period prior to the alleged injury, by a person who has not been shown to have had the title. A party relying upon historical facts must produce evidence thereof to the jury.²² The instrument purporting to be a deed and to convey the title, must be under seal. A written instrument, not under seal, is inoperative and ineffectual to pass the legal title to lands in New York.²³ An intruder cannot protect himself in the possession of the premises, by setting up the fact that the title is in a stranger. An outstanding title in a stranger cannot be set up where there has been adverse possession of twenty years. A claim or title, which could not be set up by a person while in possession, cannot be set up by another person who comes into possession under him. A parol partition of land, carried into effect by possession taken by each party of his respective share, will be valid and binding upon the parties, and is

²⁰ *Ellicott v. Pearl*, 10 Pet. 412; *Armour v. White*, 2 Hawy. 87.

²¹ *Miller v. Long Island R. R. Co.*, 71 N. Y. 380; *Saxton v. Hunt, Spencer*, 487; *Thistle v. Frostburg Coal Co.*, 10 Md. 129; *Murphy v. People*, 4 Hun, 104; *Parsons v. Brown*, 15 Barb. 590; *Lane v. Gould*, 10 Id. 254; *Graham v. Peat*, 1 East, 244.

²² *McKinnon v. Bliss*, 21 N. Y. 206.

²³ *Morss v. Salisbury*, 48 N. Y. 637.

sufficient color of title.²⁴ It is not necessary to aver in the pleadings express color of title.²⁵

²⁴ *Jackson v. Harder*, 4 Johns. 202. See 5 Wend. 54, 79, 141; 25 Id. 436; 19 N. Y. 297; 36 Id. 502; 20 Barb. 127; 43 Id. 549; 10 Johns. 356; 5 Cow. 202; 17 Wend. 78; 38 Mich. 730; 40 Barb. 231.

²⁵ *Moran v. Sign*, 2 M. & W. 95; *Acraman v. Cooper*, 10 Id. 585; *Ashton v. Brevitt*, 14 Id. 180.

CHAPTER XXXIV.

PARTITION OF PERSONAL PROPERTY.

PERSONAL property may be owned by tenants in common, or joint tenants ; and the law provides a remedy, or rather provides a right that any co-tenant in personal property may have his action for the sale of the division of that property. Cowen, in his treatise, says : "Where two persons together own any personal property, they hold it either as joint tenants or as tenants in common. They are joint tenants when they acquire their title at the same time, by the same conveyance, each taking the same interest, and each holding by the same undivided possession. The quantity or proportion of the interest may be different, but its kind must be the same. Thus, one may hold one-third and another two-thirds, but one may not hold a right to the use of the property for one year and the other the remainder. Tenants in common are those where the possession is undivided, but all, or any of the other requisites of a joint tenancy are wanting. A letting of a farm on shares creates a co-tenancy in common in the crops or other products to be divided. And so, if the one so taking land employs a third person to thresh the crop for a certain share, all the parties are tenants in common of the crop. The same rule applies to a leasing, in the same manner, of any other property, as a mill. In joint tenancy, on the death of one tenant

his right vests in the surviving tenant or tenants. In a tenancy in common it does not, but belongs to the estate of the deceased tenant. Property held by partners, whether goods or rights of action, is held in joint tenancy."¹

If the property owned by the tenants in common is such personal property that it may be separated, like wheat or other grain, each co-tenant may separate and appropriate to himself his share. This may be determined by weight or measurement ; or if the parties agree upon a voluntary division or partition of such property, they must sell the same and divide the proceeds in accordance with their respective interests therein. The right of severance, among tenants in common, by one tenant of his share, always existed, at common law, as to all property in its nature that might be severed. Where personal property, severable in its nature, in common bulk, and of the same quality, is owned by several as tenants in common, each tenant may sever and appropriate his share, if it can be determined by measurement or weight, without the consent of the others, and sell and destroy it, without being liable to them in an action for the conversion of the common property. One tenant in common may maintain an action against a stranger, for a conversion, and recover his separate interest, when the non-joinder is not pleaded in abatement.²

Where a farm is let on shares, for cultivation, and wheat is raised thereon, by a tenant, the straw is a part

¹ Cow. Tr. 619 ; 2 Blacks. Comm. 180 ; 14 Wend. 265 ; 1 Hill, 234 ; 15 Barb. 595 ; 34 Ala. 167 ; 17 Cal. 541 ; 19 Id. 617 ; 40 N. H. 403 ; 14 Vt. 214 ; 51 Ala. 434 ; 15 Barb. 333 ; 1 Wend. 380 ; 61 Barb. 293 ; 4 Kent, 360 ; Collyer on Part. § 123.

² Tripp *v.* Riley, 15 Barb. 333 ; Pierce *v.* Schenck, 3 Hill, 28 ; Gilbert *v.* Dickerson, 7 Wend. 449 ; 4 Camp. 272 ; 1 Saund. 291.

of the crop, and belongs to the owners thereof; unless there is stipulation or custom to the contrary. The owners thereof are tenants in common and may sever their interests, each taking his individual share therein. If this severance of the property cannot be brought about by mutual agreement, it may be brought about by a decree in a court of equity, decreeing the division of the property or a sale thereof, and a division of the proceeds.³

Where one tenant in common appropriates the whole of the personal property to his own use, and shows by his actions, and by such appropriations, clearly a determination to deprive the other co-tenant of any portion of the common property, an action of trover can be sustained between the co-tenants for a conversion of the property.⁴ Although no action at law will lie, at the suit of one tenant in common, against another, in respect to the common property, without proving a loss, destruction or sale of the property by a defendant; and although no action at law can be maintained by one tenant in common for the partition of such property, yet a court of equity is competent to give relief in such cases, by decreeing that such property shall be partitioned, or that there shall be a sale of the same, where partition is impracticable, and a division of the proceeds. The power of a court of equity, and its jurisdiction, is expressly to meet just such cases, where no adequate remedy exists at law.⁵ It is within the jurisdiction of a court of equity to partition personal property, and that when justice requires that real and

³ *Fobes v. Shattuck*, 22 Barb. 568.

⁴ *Lobdell v. Stowell*, 37 How. Pr. 88.

⁵ *Tinney v. Stebbins*, 28 Barb. 290; *Smith v. Smith*, 4 Rand. 95; *Kelsey v. Clay*, 4 Bibb, 441. See 15 Barb. 336.

personal estate be sold together, and the proceeds divided, it is within the province of such a court to so decree.⁶

Instances of co-tenancy in personal property is lost in the ownership of vessels. Often vessels or ships, upon sea, are owned by two or more individuals as co-tenants, such co-tenancy arising from purchase, or, perhaps, from inheritance from a common ancestor, who owned the ship or vessel in his life-time. Where a vessel is owned, in unequal proportions, by several persons, who cannot agree upon the sale or for the working of it, the Supreme Court of New York has jurisdiction over an action brought by one owner to procure the appointment of a receiver, the sale of the vessel, and a division of the proceeds among the owners thereof. It is questionable whether the admiralty courts can exercise such jurisdiction or not, that is, to order a sale of the vessel owned by co-tenants in common, excepting in those cases in which the opposing interests in the vessel are equal. If the admiralty courts have such jurisdiction in cases where there is unequally of interests, it is not an exclusive jurisdiction to that court but concurrent with that of the common law courts. The court of equity has jurisdiction over an action, brought to secure a partition of personal property between tenants in common thereof. It matters not whether such property is a vessel to be used, upon the high sea, or other personal property so long as there is a co-tenancy, and a failure to agree upon the part of the co-tenants, a court of equity has jurisdiction over the partition of the property, or a sale thereof and a division of the proceeds. Such court is competent to give relief in such cases by making the decree in partition, as the

⁶ *Prentice v. Janssen*, 7 Hun, 86.

circumstances of the case or facts may warrant, or decree a sale, where the partition of such property cannot be had.⁷

Proceedings for the partition of personal property are unknown at common law, and for that reason courts of equity have jurisdiction of such actions.⁸ Such action may be brought by one co-tenant in common, so long as there is no dispute in regard to the possession of the property, but the bill cannot be maintained while one is holding the property in adverse possession.⁹ A court of equity may try the title of the co-tenants in common to the property, that is, where a suit in partition is brought for the purpose of disposing of personal property, and one or more of the defendants, alleged that they owned the title to the property sought to be partitioned, denying the title of the plaintiff in any portion of it, then the question of title may be passed upon by a court of equity.¹⁰ When the estate of the common ancestor is free from debt, and those who inherit such estate fail to invoke the action of the probate court to give to them their respective shares in the personal property, application may be made to a court of equity to do so; and, upon such application, all the facts fully appearing to sustain such relief, a court of equity will grant the relief required by the pleadings, and in conformity with the evidence, or, on the other hand, such parties failing to take upon themselves the benefits of the jurisdiction of the probate court, by having that court settle the estate and allotting to each, his or

⁷ *Andrews v. Betts*, 8 Hun, 322; citing 28 Barb. 290; 4 Rand. 95; 4 Bibb, 441; 15 Barb. 334; 22 Id. 570; 2 Lans. 211.

⁸ *Marshall v. Crow*, 29 Ala. 278; *Irwin v. King*, 6 Ired. 219; *Savage v. Williams*, 15 La. Ann. 250.

⁹ *Drew v. Clemons*, 2 Jones Eq. 312.

¹⁰ *Edwards v. Bennett*, 10 Ired. 361; *Smith v. Dunn*, 27 Ala. 315.

her respective share, they may make a voluntary partition of the property, assuming, of course, that they are all of full age, and there is no fraud, collusion or unfairness in the transaction.¹¹

Evidence of a demand and refusal is held sufficient to establish a conversion by one co-owner of grain of the portion belonging to the owner other, even if the evidence shows that the refusal was to deliver any portion of the grain belonging to a co-owner ; and such refusal precludes the one so refusing from afterwards raising the objection that the demand was for too much.¹²

¹¹ *Bethea v. Mc Coll*, 5 Ala. 308 ; *Miller v. Eatman*, 11 Id. 709 ; *Vanderveer v. Alston*, 16 Id. 494 ; 5 *Wait Act. & D.* 89.

¹² *Hollman v. Randall*, 26 N. Y. Week. Dig. 20.

CHAPTER XXXV.

APPEAL.

PROVISION is made that the party feeling aggrieved with the decision or decree made by the court, may make his appeal to an appellate tribunal. There the decision, decree, order, judgment or award made by the court below may be reviewed, modified or reversed ; and, in many instances, sent back to the court below for a new trial. Previous to the enactment of the Code of Procedure of New York, there were two modes of reviewing proceedings of inferior courts. Judgments at common law were reviewed by writ of error, while decrees in chancery were reviewed by an appeal from the chancellor to the court for the correction of errors. In those States which have not as yet adopted a Code practice, the common law method of making appeals is in vogue, unless the same has been superseded by statutory provision. But in those States where a Code of Procedure has been adopted, the method of appeal is prescribed in such Code. To a certain extent the method of appeal furnished by the Code is a mere substitute for the old writ of error, the change to a certain extent being only of name. It is the same, except that there is some change in the manner of practice.¹

¹ *Gormly v. McIntosh*, 22 Barb. 271.

There has been considerable discussion as to whether an appeal was not in the nature of a new action, but the better decisions, undoubtedly, are that an appeal is a continuation of the pending action, and of the proceedings therein. As it now is, upon an appeal the appellate court reviews and acts upon that which has been placed before the court, from which the appeal is taken, and the action or judgment of such court.³ The nature, scope and general character of an appeal varies according to the nature of the action or proceedings that are brought before the appellate court. The action may be brought before the appellate court upon the ground that the decision by the court below is not sustained by the evidence which was presented to it. On the other hand, the appeal may be taken purely upon the ground that the law would not permit the court below to enter or decree the judgment made by them, or again evidence may have been denied or admitted improperly, and exceptions taken to the ruling of the courts, pertaining to the admission of such evidence or the rejection of the same, and the appellant relying in the appellate court upon his appeal, purely upon what he claims to be the mistakes of the courts below, in the admission or rejection of evidence presented to it. The questions raised by the appeal are the only questions that will be reviewed by the appellate court, and they will not assume to consider any question, whether it be of law or of fact, or whether it pertain to the ruling of the court relative to evidence or an action belonging to the jury only, unless the same shall have been before the trial court, and considered by such court as a part of the case,

³ *Rice v. Floyd*, 1 Code R. 122; *Enos v. Thomas*, 5 How. Pr. 361; *Whitley, v. Leed*, 27 Id. 378; *Seeley v. Pritchard*, 3 Duer. 669; *Traver v. Nichols*, 7 Wend. 434; *Matter of Gates*, 26 Hun. 179.

or the court declined to consider the element when presented. The jurisdiction of the appellate court upon the appeal, while, perhaps, not technically an original jurisdiction, must be exercised by them originally, so far as the questions are before it, upon which it is to pass judgment.

Affidavits on motion for a new trial can only be brought into the record by a bill of exceptions or a special order of court. The supreme court has no power to weigh conflicting evidence in a suit in equity or in an action at law. The rule is, generally, that they are forbidden to disturb the finding of the trial court, made upon the weight of the evidence. This is especially so when the questions of fact litigated in the case have been settled by a verdict of a jury, and those questions are in conflict.⁴ Appeals will lie, when nothing remains to be done except to enforce the decree of the court below; but until all the rights of the parties have been finally passed upon and settled, the decree is not final, and an appeal from it will not lie. The objection, that a court of equity has no jurisdiction of the case, raised in the appellate for the first time, will not, as a rule, be considered. Deliberate concealment is equivalent to deliberate falsehood, and may be taken into consideration upon appeal.⁵ Appeals should be made in season. A lapse of time of great length is laches, and the respondent should have the benefit of all the laches of which the appellant has been guilty. Whenever the time for making the appeal is prescribed by statute, courts should be governed by that time; otherwise they should require that the appellant present his

⁴ *McConnell v. Huntington*, 5 West. R. 861; *Houston v. Bruner*, 39 Ind. 376; *Lake Erie & W. R. R. Co. v. Griffin*, 92 Id. 487. See 99 Ind. 261; 93 Id. 345; 75 Ind. 108; 65 Id. 72.

⁵ *Crosby v. Buchanan*, 23 Wall. (90 U. S.) 420.

case in due time, in good faith, and with diligence. When he is guilty of laches by reason of unreasonable delay, his appeal should be dismissed.⁶

An interlocutory judgment is not a final decree. The rule is laid down that it cannot be corrected by a direct appeal; that the parties to the action must wait until a final judgment shall have been entered.⁷ No appeal to the court of appeals is authorized by statute, prior to the entry of the final judgment. Such is the rule which has been laid down by the Court of Appeals of New York, and that an order in proceedings for partition, declaring the rights of the parties and appointing commissioners to make partition, is not final, and an appeal from such order cannot be sustained.⁸ A decree which determines the issues as set forth in the pleadings, and directs a partition of the property accordingly, and in accordance with the rights of the parties, as determined by such decree, is regarded as final, for such a decree leaves nothing to be done but to execute the directions therein contained.⁹ This rule in Texas cannot be said to be a general rule. Though in some States, to avoid the difficulty that sometimes arises by there not being an appeal from an interlocutory judgment, the statute authorizes such an appeal.¹⁰

⁶ *Coleman v. Lyne*, 4 Rand. 454; *Mooers v. White*, 6 Johns. Ch. 368; *Lacon v. Briggs*, 3 Atk. 107; *Hersey v. Dinwoody*, 4 Brown C. C. 257; *Thompson v. Dean*, 7 Wall. 342; *Stoval v. Banks*, 10 Id. 583.

⁷ *Ivory v. Delare*, 26 Miss. 505.

⁸ *Beebe v. Griffing*, 6 N. Y. 465; *Cruger v. Douglass*, 2 N. Y. 571. See *Clowes v. Van Antwerp*, 4 Barb. 416; *Clester v. Gibson*, 15 Ind. 10; *Cook v. Knickerbocker*, 11 Id. 230; *Pipkin v. Allen*, 29 Mo. 229; *Durham v. Durham*, 34 Id. 447; *Medford v. Harrell*, 3 Hawks, 41.

⁹ *McFarland v. Hall*, 17 Tex. 676.

¹⁰ Cal. C. C. Pro. § 939; *Regan v. McMahon*, 43 Cal. 627; *Shepherd v. Rice*, 38 Mich. 556; *Randles v. Randles*, 67 Ind. 434.

An appeal from the final decree brings with it the interlocutory orders that may have been entered from time to time during the progress of the action.¹¹ When objections are taken to the report of the master in chancery, if no exceptions are taken in the court below, such objections cannot be sustained on appeal.¹²

A decree for the sale of real estate by a trustee for the purpose of partition cannot be reviewed for defects, errors or irregularities in the proceedings, though apparent on their face, by exceptions to the order ratifying the sale. Such defects, errors or irregularities can only be reached and corrected by a direct appeal from the decree, or by a bill of review for errors apparent. It is the allegation as set forth in the bill or complaint that confers the jurisdiction upon the court and determines the power of the court to decree a sale of the property sought to be partitioned or sold; and, although the proof may be defective, or the decree passed without proof, that does not in any way affect the jurisdiction of the court. Such defects may show error in the exercise of jurisdiction, but not the want of jurisdiction. If a party desires to avail himself of the objection of the want of proof, he should appear and defend. He cannot allow judgment to be taken against him, by default, and afterward, feeling aggrieved by reason of such judgment, accept or receive relief from the appellate court for the reason of insufficiency of proof in the trial court.¹³ If the court had jurisdiction, which appeared by the pleadings, and entered a judgment

¹¹ *Ex parte Jordan*, 4 Otto, 248.

¹² *Kinsman v. Parkhurst*, 18 How. U. S. 289; *McMicken v. Perin*, 18 Id. 507; *Hudgins v. Kemp*, 20 Id. 45.

¹³ *Slingluff v. Stanley*, 5 Cent. R. 609; *Tomlinson v. McKaig*, 5 Gill, 256; *Bolgiano v. Cooke*, 19 Md. 373; *Gregory v. Lenning*, 54 Md. 51.

upon the proof above in accordance with the pleadings, its decree must be executed, unless it be reversed by regular proceedings had for that purpose.¹⁴ The titles of the parties or co-tenants should be shown by proof. The failure to do so is a defect, which, upon proper objection and exception, is good reason for appeal.¹⁵ It has been held that the principle that where the title is in dispute, or where the legal title is doubtful, the complainant should be sent to a court of law to establish his title only applies where the bill shows clearly a dispute of title, or where the defendant has answered or alleged or shows it.¹⁶ The appellate court should not examine into the merits of a decree collaterally, that is, if the court making the decree had proper jurisdiction to do so.¹⁷ A writ of appeal in common is limited to final decrees, or to orders involving the merits; it does not extend to such orders as are merely interlocutory, or to decrees by consent or default. The judgment or decree appealed from should be final.¹⁸ This is the rule in Federal courts that no appeal will lie, except from the final decree. Courts do not favor appeals from a mere decree respecting costs and expenses.¹⁹

In equity cases, courts have been more liberal in allowing appeals from judgments or decrees pertaining to costs.

¹⁴ *Patapso Guano Co. v. Elder*, 53 Md. 463.

¹⁵ *Boone v. Boone*, 3 Md. Ch. 497; *Campbell v. Lowe*, 9 Md. 508; *Wilkin v. Wilkin*, 1 Johns. Ch. 111.

¹⁶ *Chesapeake & Ohio Canal Co. v. Young*, 3 Md. 480; 2 Dan. Ch. Pr. 1202.

¹⁷ *Davis v. Helbig*, 27 Md. 457; *Hunter v. Hatton*, 4 Gill, 122.

¹⁸ *Keirle v. Schriver*, 11 Gill & J. 405; *State v. Pepper*, 7 Miss. 348; *Syle v. Llewellyn*, 1 Bland Ch. 18; *McKim v. Thompson*, Id. 150.

¹⁹ *Canter v. Am. & Ocean Ins. Co.*, 3 Pet. 307; *Elastic Fabric Co. v. Smith*, 100 U. S. 110.

only.²⁰ "Final judgment" means that judgment which determines the particular cause or action before the court.²¹ In one case, where the main question was as to the effect of the partition decree upon the mortgage, and whether a purchaser of a portion of the land sold, paying the balance due on the mortgage debt after exhausting the proceeds of the sale, is entitled to contribution from the owners of the mortgaged lands not sold,—his right to such contribution being determined by the appellate court,—the case, under the directions of that court, will go back to the circuit court to decide how contribution should be made, as it is a question of which the trial court has jurisdiction, and that jurisdiction should not be disregarded, but should be exercised by it.²² Appeals made from decisions of a trial court in actions or matters relating to a decedent's estate should be made in conformity with the statutory provisions relating to decedents' estates.²³ Where the statutory law governing actions brought in partition provides a special manner for making an appeal, that law should be fully complied with and explicitly followed, otherwise the appellate court would not gain jurisdiction of the appeal and could not pass upon it; or if there is a special statutory law prescribing how appeals should be made in equity cases, or in actions relating to the sale of real estate, the statute being silent in regard to appeals in partition cases, the law and practice relating to cases in equity or real estate actions

²⁰ *Trustees v. Greenough*, 105 U. S. 527.

²¹ *Weston v. Charleston*, 2 Pet. 449; *Wilson v. Daniel*, 3 Dall. 401.

²² *Vogel v. Brown*, 8 West. R. 645.

²³ *Rinehart v. Vail*, 1 West. R. 542; *Seward v. Clark*, 67 Ind. 289; *Helenberg v. Bennett*, 88 Id. 540; *Browning v. McCracken*, 97 Id. 280.

would govern and would be the proper practice for the appellant to follow. When a party perfects an appeal in accordance with the requirements of the statute, as declared by the supreme court, and a motion to strike the cause from the docket is overruled by the court, that ruling, whether erroneous or not, is the law of that case, and must stand, and a subsequent motion by the appellee to dismiss the appeal, founded upon the latter decision, will be overruled.²⁴ Submission of a cause to the appellate court by agreement waives the motion that might have been made for the dismissal of an appeal for the want of filing of the bond required.²⁵ A writ of error will not lie to reverse a decree removing a receiver, although the decree or order gave the defendant in error possession of the property, if the defendant in error was required to give bond and security, and all moneys which might come into his hands were subject to the final decree which the court might render in the cause. This rule is laid down in Illinois; and further, that when the original bill is heard on its merits and a final decree rendered which will definitely settle the rights of all the parties to the cause, it will then be ample time, if the decree is erroneous, for either party to appeal or sue out a writ of error. This last principle is based upon the fact that courts do not favor an appeal from any decree, except that which is final.²⁶

As to receivers, the rule seems to be that a receiver cannot appeal from an order discharging him and direct-

²⁴ *Walker v. Heller*, 1 West. R. 595.

²⁵ *Bake v. Smiley*, 84 Ind. 212; *Davis v. Huston*, Id. 272. See *69 Id. 18*; *90 Id. 520*; *99 Id. 117*.

²⁶ *Farson v. Gorham*, 4 West. R. 111.

ing him to turn over the property.²⁷ Courts must be permitted to control their own receivers and retain or remove them as they think proper. The authority of a court in the retention or removal of a receiver, is generally discretionary and should not be interfered with by an appellate court. It is not often that a receiver is appointed in partition proceedings, but when one has been appointed, he is subject to the mandates of the court creating him, and it is not for him to appeal or feel aggrieved in case the court, in its discretion and wisdom, should see fit to remove him. A receiver is a creature of the court, and is as much governed by the court in the transaction of his affairs as receiver, as he is protected by such court in obeying its lawful commands. An appeal taken from a final decree carries to the appellate court all the intervening or interlocutory decrees that have been made in the action.²⁸ Intervening or interlocutory decrees are not admissible to prove that the subject matter in controversy is *res judicata* between the parties.²⁹

The principle that the appeal must be taken from the final decree is well illustrated by the remarks of Justice Catron in an action in the United States court, wherein the complainant sought to establish an equitable title to large tracts of public lands in Mississippi, he having offered to comply with the law providing for the entry and purchase at private sale for the several tracts, but

²⁷ *High on Receivers*, §§ 836, 847.

²⁸ *Ayers v. Carver*, 17 How. U. S. 591; *Crosby v. Buchanan*, 23 Wall. 420, *ante*; *Ex parte Jordan*, 74 U. S. 252, *ante*.

²⁹ *Quarles v. Kerr*, 14 Gratt. 48; *Whitaker v. Bramson*, 2 Paine, 209; *McClane v. Spence*, 11 Ala. 172; *Auld v. Smith*, 23 Kan. 65; *New Orleans Nat. Bank v. Adams*, 3 Wood U. S. 21; *Baugh v. Baugh*, 4 Bibb, 556.

was prevented from making the entries, and from obtaining the necessary certificates, by the illegal and unwarranted acts of the register and receiver at the public land-office. This was alleged in his complaint. The bill was filed against the defendants, who were certain individuals who had subsequently entered upon and paid for the land. The defendants were claimed to be numerous, two of whom filed a cross-bill setting up titles to the lands in dispute paramount to that of their co-defendants and asked a decree to that effect, which cross bill the court below on demurrer dismissed.³⁰ Mr. Justice Catron said : "In this instance, the bill and cross-bill are but one suit, and ought regularly to have been heard at the same time, and, if an appeal was prosecuted from the decree to this court, by any party who supposed himself to be aggrieved, the whole suit would necessarily be brought up. Here the cross-bill was heard and dismissed, pending the original suit of which it was a part. The decree pronounced was partial; and as no appeal lies from any but a final decree, and this decree not being final, the consequence is that this court has no jurisdiction to examine the merits presented and insisted on in the argument. All that we can properly do is to dismiss the appeal, because it brought up nothing."³¹

The complainant has a right to discontinue his action at any time before judgment, or before the case has been submitted to the jury. There are a few exceptions to this general rule, but the rule can be considered as the law in partition cases. In case of the refusal of the trial court to allow the complainant to discontinue his action,

³⁰ *Niles v. Carver*, 17 How. U. S. 591, *ante*.

³¹ See 9 Wall. 809; 16 Id. 271; 1 Otto, 385; 11 Id. 187; 5 Saw. 71, where *Niles v. Carver* has been cited by the court.

and an interlocutory judgment is rendered thereafter, an appeal may be taken from the order or judgment of the trial court thus refusing to allow the complainant to discontinue. Such appeal would carry with it to the appellate court the interlocutory judgment, not for the purpose of having a review of that judgment, but for the purpose of informing the appellate court what had been done as against the rights of the parties desiring to discontinue their action.³² An action of partition is an action of equity;³³ and as such it is to be treated, so far as the stating of issues for a jury to decide, as an ordinary common-law action. Where a general objection is made to a decision of a court on the trial of a cause, and on a review thereof it appears that the decision, if objectionable at all, is so only in part, the party is not allowed to avail himself of the objection, for the want of precision in stating it at the trial.³⁴

An application to open a judgment, not to set it aside, is addressed to the sound discretion of the court below, and the decision of that court is not reviewable on writ of error, the appellate court presuming that the discretion of the court below was fairly and justly exercised.³⁵ A court, in opening a judgment, has power to prescribe the terms upon which the judgment is opened, as it is but a mode of allowing the defendant a hearing on the merits, and a court may impose such terms as it may deem proper.³⁶

The courts, in giving construction to a statute, should

³² *Furman v. Furman*, 12 Hun, 441.

³³ *Hewlett v. Wood*, 62 N. Y. 75.

³⁴ *McAllister v. Reab*, 4 Wend. 483.

³⁵ *Huston v. Mutual Fire Ins. Co.*, 1 Cent. R. 365.

³⁶ *McMurray v. Eris*, 9 P. F. S. 225; *Braddee v. Brownfield*, 2 W. & S. 279.

follow, as near as possible, the intent of the legislature, and should do so with reason and discretion, though such construction seems contrary to the letter of the statute. Where the intent of the legislature can be ascertained with reasonable certainty, the statute will be construed in accordance therewith, although such construction may conflict with the ordinary meaning of the letter.³⁷ In general, the intent of the legislature must be found in the statute itself. The mischief existing at the enactment, and the remedy intended, are to be considered by the court in making its construction.³⁸ In construing statutes pertaining to or regulating actions affecting real property, the rule that the intent of the legislature must be placed upon the statute, governs to the same effect as if the statute pertained to any other matter or any other remedy. The construction, if possible, placed upon the statute by the court, should be, so far as within their power and within the meaning and intent of the legislature, to reconcile such statute so construed to the common law governing the actions and the rights of the parties. The failure of the courts to do so is proper reason for going to the appellate court, that the statute might be construed in accordance with the intent of the

³⁷ *Tonnele v. Hall*, 4 N. Y. 140; *Simonds v. Powers*, 28 Vt. 354; *Brown v. Wright*, 13 N. J. 240; *Ryegate v. Wardsboro*, 30 Vt. 746; *Sprowl v. Lawrence*, 33 Ala. 674.

³⁸ *Tyman v. Walker*, 35 Cal. 634; *State v. Nicholls*, 30 La. Ann. 980; *Edger v. Randolph*, 70 Ind. 331; *Ezekiel v. Dixon*, 3 Ga. 146; *Winslow v. Kimball*, 25 Me. 493; *Sibley v. Smith*, 2 Mich. 486; *Alexander v. Worthington*, 5 Md. 471; *Catlin v. Hull*, 21 Vt. 152; *United States v. Bowen*, 100 U. S. 508. See *Swift v. Luce*, 27 Me. 285; *Whitney v. Whitney*, 14 Mass. 88; *Maxwell v. Collins*, 8 Ind. 38; *Bradbury v. Wagenhorst*, 54 Pa. St. 180; 10 Minn. 118; 67 Mo. 408; 66 Mo. 423.

legislature and within the rules of equity so far as possible.

A court of equity performs the like functions to those performed by a jury, and the appellate court is not inclined to review the decision made by the court below, unless under circumstances of a peculiar and urgent nature, especially when the decision of the court is in settlement of controverted facts. A court of equity will not interfere, when there is a proper remedy at law, of which the court has jurisdiction.³⁹

An interlocutory decree is usually considered a necessity in an action of partition. Where the circuit court, after hearing the evidence in the action, decreed that the complainants were entitled to two-sevenths of certain property, and then referred the matter to a master in chancery to take and report an account of it, and then reserved all other matters in controversy between the parties until the coming in of the master's report, this was not such a final decree as should be appealed from to the appellate court.⁴⁰ The practice of the United States chancery courts differs from the English practice. There, appeals to the House of Lords may be taken from an interlocutory order of the chancellor.⁴¹ The special term has power to allow amendments to be made to the pleadings. Where, in action for the construction of a will, upon application to amend the complaint, changing the nature of the action to one for partition, the trial was suspended, and the case put over the term to enable the plaintiff to apply at special term for leave to amend, it was held, that the amendment granted cannot properly be deemed

³⁹ *Dade v. Irwin*, 2 How. U. S. 382, 391.

⁴⁰ *Perkins v. Fourniquet*, 6 How. U. S. 206.

⁴¹ *Forgay v. Conrad*, 6 How. U. S. 205.

to be one made on the trial, and is not, therefore, open to the objection that the cause of action was changed during the trial, without an opportunity given to prepare for a defense to the new cause of action. The amendment was one that the special term had power to grant before trial, and the court having suspended the trial and put the case over the term, the order is to be treated as one made before trial.⁴²

Where a decree in a partition suit awards costs, a notice of judgment served prior to the taxation and entry of the costs does not limit the time for appeal.⁴³

⁴² *Shannon v. Pickell*, 2 N. Y. State R. 160.

⁴³ *Thurber v. Chambers*, 60 N. Y. 29.

ADDENDA.

REMAINDERMEN.

The following enactment by the New York Legislature became a law since the chapter in this work upon remaindermen was in type ; and for that reason is given here, and is to be read in connection with chapter III., and to some extent it changes the practice in New York State, as laid down by section 1533 of the New York Code of Civil Procedure, as it appears upon page 34.

CHAPTER 683.

AN ACT to amend section one thousand five hundred and thirty-three of the Code of Civil Procedure.

Passed June 24, 1887.

The People of the State of New York, represented in Senate and Assembly, do enact as follows :

SECTION 1. Section one thousand five hundred and thirty-three of the Code of Civil Procedure is hereby amended so as to read as follows :

§ 1533. Where two or more persons hold as joint tenants, or as tenants in common, a vested remainder or reversion, any one or more of them may maintain an action for the partition of the real property to which it attaches, according to their respective shares therein, subject to the interest of the person holding the particular estate therein, but no sale of the premises in such an action shall be made, except by and with the consent in writing, to be acknowledged or proved and certified in like manner as a deed to be recorded, by the person or persons owning and holding such particular estate or estates ; and if in such an action it shall appear in any stage thereof that partition or sale cannot be made without great prejudice to the owners, the complaint must be dismissed. The dismissal of the complaint, as herein provided, shall not affect the right of any party to bring a new action, after the determination of such particular estate.

§ 2. This act shall take effect immediately.

FORMS.

No. 1.

Affidavit on Application to Surrogate for leave to bring Partition Action by Infant.

New York Code Civ. Pro. § 1534.

County, ss.:

A. B., of the city of _____, being only sworn, says, that he is the father of C. D., who is an infant child of the age of _____ years, and who resides with this deponent, and that said C. D. is the owner, as a tenant in common with G. H. and M. N., of the equal, undivided one _____ part of certain real estate, situate in the _____ of _____, in the county of _____, described as follows, to wit: *[Insert description.]*

This deponent further says, that, in his opinion, a suit should be authorized to be brought by said infant for the partition of the aforesaid property, of which he is a tenant in common with the above named persons, and that the following are deponent's reasons for such opinion. *[Here state facts as required by the Code.]*

[Signatures and seals.]

Sworn to before me, this _____ day
of _____ 18_____.

L. P., Notary Public.

No. 2.

Order Granted on the foregoing Affidavit.

New York Code Civ. Pro. § 1534.

[*Title of cause.*]

Upon reading and filing the foregoing affidavit of A. B., sworn to the day of , 18 , before L. P., Notary Public, and being satisfied by the affidavit aforesaid, that C. D., who is an infant of the age of years, is the owner of the equal, undivided of the real estate described in said affidavit, situate in the town of in the county of , as a tenant in common with others, and that the interest of said infant will be promoted by his bringing an action for the partition of said property.

Now, therefore, on motion of C. K., attorney for said infant, it is hereby Ordered, That the said C. D. may, and he hereby is authorized to bring such action.

_____, Surrogate.

Dated , 18 .

No. 3.

Bond of Guardian ad litem in Partition Suit.

New York Code Civ. Pro. §§ 812, 1536.

Know all men by these presents, that we, [*names, residence and business*] are held firmly bound unto , in the sum of dollars, to be paid to the said C. D., [*or, to the said people,*] or his certain attorney, executor, administrators or assigns. [*or, successors or assigns.*]

For which payment, well and truly to be made, we

bind ourselves and our heirs, executors or administrators, jointly and severally, firmly by these presents.

Sealed this day of , in the year of
our Lord one thousand eight hundred and .

The condition of this obligation is such, that if the above bounden shall faithfully discharge the trust committed to him as guardian of the infant plaintiff [or, defendant] C. D., in an action for partition in the court, in which is plaintiff and and others are defendants, and shall render a just and true account of his guardianship in any court or place where thereunto required, then this obligation to be void, otherwise to be and remain in full force and virtue

State of New York, County, ss.:

On this day of , 18 , personally came before me , to me known to be the individuals described in and who executed the foregoing instrument and to me acknowledged that they executed the same.

_____, Notary Public.

State of New York, County, ss:

, being duly sworn, each for himself deposes and says, that he is one of the sureties named in the foregoing bond ; that he is a resident of and a freeholder [*or, householder*] within the State, and is worth the sum of dollars, over all the debts and liabilities which he owes, or has incurred, and exclusive of property exempt by law from levy and sale under execution.

[*Signatures and seals.*]

Sworn to and subscribed before

me, this day of , 18 .

I hereby approve of the foregoing bond [*or, undertaking*], as to its form and manner of execution, and as to the sureties therein mentioned.

Judge [*or, Justice*] of _____ court.
, 18 .

No. 4.

Complaint in Action for the Partition of
Real Property held under Devisee
containing Provisions for Trust
Estate and Remainders.

New York Code Civ. Pro. § 1542.

[*Title of cause.*]

The complaint of the above named plaintiff respectfully shows, that A. B., the brother of said plaintiff, late of the _____ of _____, in the county of _____, was, at the time of making his last will and testament, as hereinafter mentioned, and also at the time of his death, seized in fee simple absolute, and in possession of those certain lots, pieces or parcels of land, situated in the county of _____, bounded and described as follows, to wit [*describe property*] :

And, being so seized and possessed, the said A. B. died on or about the _____ day of _____, 18 .

And the said plaintiff further shows, that the said A. B., in his lifetime, to wit : on or about the _____ day of _____, 18 , made and published his last will and testament in manner and form as required by law to pass real and personal estate, whereby, after certain other devises and bequests, he devised and bequeathed the rest and residue of his property in the following words and manner, viz. : "Sixth. I give, devise and bequeath all the rest and remainder of my real and personal estate, in equal portions, to my brothers and sisters living at the time of my decease, and the portion of such as are not now living, or who may not survive me, to their descendants, except the portion of my brother, C. B., which I devise and bequeath to my executor, hereinafter named, in trust, to receive the income and issues thereof, and apply the same to the use of my said brother, C. B., during the term of his natural life ; and, after the death of

my said brother, I give and devise the said portion to his children living at the time of his decease, and to the descendants of such of his children as shall not survive him."

That in and by said will, the said testator appointed the defendant, P. F., to be executor thereof.

That said will was duly proved and recorded in the surrogate's court of county, on the day of , 18 , and letters testamentary thereupon were, on the day of , 18 , duly issued to the defendant, P. F., by said surrogate's court, and he has duly qualified as executor of said will.

That the said rest and remainder of said testator's real estate, mentioned in the sixth clause of said will above recited, consisted, at the time of his death, of the lots above particularly described.

And the plaintiff further shows, upon information and belief, that he, together with the defendants, C. F., B. F., and G. S., were the only surviving brothers and sisters of the said testator at the time of his said death, except C. B., and the defendants, S. B., J. P. and L. B., children of G. B., a brother of said testator, who died during said testator's lifetime, and J. G., S. B. and F. B., children of M. B., another brother of said testator, who died during the lifetime of said testator, were the only descendants of deceased brothers and sisters of the testator living at the time of his death.

That said F. B. has, since the death of the said testator, by deed dated , 18 , recorded in county clerk's office, in book No. of deeds, at page , granted and conveyed all his right, title and interest in and to the property devised by said will to the defendant, E. J.

And the plaintiff further shows, upon information and belief, that under and by virtue of the provisions of said will and the grant aforesaid, the plaintiff and the defendants who are hereinafter stated to be so seized, are seized and possessed of those certain lots and pieces of land

hereinbefore described, as tenants in common, and the rights and interests of the plaintiff and the defendants therein are as follows, viz. :

The said plaintiff and the defendants, C. F., B. F. and G. S., are each of them seized of and entitled, in fee absolute, to one undivided part thereof, the share of the defendant, said B. F., being subject to the inchoate right of dower therein of his wife, the defendant, P. F.

The defendants, S. B., J. P. and L. B., are each of them entitled to the one-eighth part thereof in fee simple absolute, and the defendants, J. G., S. B. and F. B. are each of them seized of and entitled to one equal, undivided eighth part thereof, in fee simple absolute, the share of said L. B. being subject to the inchoate right of dower therein of his wife, the defendant, J. B.

The defendant, P. F., as executor and trustee named in said last will and testament, are seized of and entitled to the one equal, undivided eighth part thereof during the lifetime of said defendant, C. B., in trust, to receive the income and issues thereof, and apply the same to the use of said C. B.

The defendants, R. B. and J. B., the only now living children of said C. B., have equal vested estates in remainder in the portion devised in trust as aforesaid, subject to open and let in any children of said C. B. who may be born hereafter, and the estate of each of them being liable also to be divested by his or her death during the lifetime of said C. B., and to vest in the survivors and the descendants of such of said children of said C. B. as shall be dead, leaving descendants, at the time of said portion being so divested.

And the defendants, J. B. and M. B., the children of said R. B., have contingent interests in said portion so left in trust, and in case of their said father dying in the lifetime of said C. B., they, or such one of them as shall survive said C. B., will be entitled to share equally with the children and other descendants of said C. B., who may be living at the death of said C. B., in the portion so left in trust.

The defendant, H. B., wife of R. B., has no present interest in said premises ; but would, on the death of said C. B., become entitled to an inchoate right of dower in such part of said premises as should, by that event, vest absolutely in fee simple in her husband.

The defendant, P. F., is the husband of said defendant, C. F. [and has had living issue by her], and the interest of said C. F. is subject to the rights if any, which her said husband may have therein as such.

That the plaintiff and the defendants [*naming them*], heirs at law of A. B., have a contingent interest also in said portion so left in trust, as the only persons now living who would, as the heirs at law of said A. B., the testator aforesaid, be entitled to the said portion so held in trust, in case said C. B. should die leaving no children or descendants of children him surviving ; and in case they should become so entitled, the defendants [*naming wives of heirs at law*], if living, would become entitled to inchoate rights of dower in such part of said premises as should vest in their said husbands, and the shares of said [*name heirs at law who have living husbands*] would be subject to the rights which their husbands might have therein as such husbands, if living.

That the plaintiff and all of the defendants are of full age, excepting the defendants [*naming them*], who are minors under the age of fourteen years, and the defendants [*naming them*], who are minors upwards fourteen years of age.

That the defendant, O. B., as the widow of said A. B., is seized of a right of dower in said premises, which has not been admeasured.

[*If there are defendants having shares or interests in the property who are unknown, or whose names, or part of whose names are unknown, say :]* that the undivided part of said property belongs to the defendant, R. H. [*stating nature of interest and how derived*]; that the place of residence of said R. H. [*if living*] is unknown to the plaintiff, and cannot be ascertained by him.

Or, that the name of the defendant who owns the undivided part of the premises [stating nature of interest and how derived], is unknown to the plaintiff, and cannot be ascertained by him.

Or, that some person or persons, to the plaintiff unknown, have estates or interests in said property, the nature and conditions of which are to the plaintiff unknown.

[Or, otherwise, as the case may require.]

That the land and premises hereinbefore described, of which partition is desired, are the only real estate owned by all the parties to this suit as tenants in common, and in which no other person is interested, and that there are no specific liens or incumbrances upon the said lands and premises against any of the parties to this suit [*or, any liens or incumbrances may be set forth affecting the whole property, or any interest therein.*]

The plaintiff therefore prays that partition and division of the real property hereinbefore mentioned and described may be made by and under the direction of this court, between said plaintiff and said defendants, according to their respective rights and interests therein, and that commissioners may be appointed by the court for the purpose of making such partition, or in case a partition of said premises, or of any part thereof, cannot be made without great prejudice to the owners thereof, then that the said premises, or such part thereof as cannot be divided, may be sold by and under the direction of this court, and that the proceeds of the sale, after paying the costs and expenses of this suit, may be divided among the owners thereof, according to their respective rights and interests therein, and that plaintiff may have her costs of this suit, and such other and further relief as may be just.

J. H., Plaintiff's Attorney,

[Office address.]

[Verification as prescribed by the Code.]

No. 5.

Complaint in Action for Partition of Real Property among Heirs at Law.

New York Code Civ. Pro. § 1542.

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that L. H., of , in the County of , was in his lifetime seized in fee simple and in possession of the following described real estate, to wit : *[insert description.]*

That the said L. H., being so seized of the above described property, died on the day of , 18 , intestate, leaving the defendant, C. H., his widow, and said plaintiff and the defendants, E. C., wife of B. C., deceased, his children, and S. H. and E. H., his grandchildren, being children of H. H., a deceased son of the said L. H., his only heirs at law.

That by the death of the said L. H., the plaintiff, A. H., and said defendants, E. C., wife of B. C., deceased, S. H. and E. H. became seized in fee as tenants in common, by descent from the said L. H., of the above described property,—that is to say : the plaintiff and A. H. and E. C., each became seized of the one equal undivided fourth part of the said property, and the said S. H. and E. H. became seized each of one undivided eighth part thereof, which would have belonged to the said H. H. had he survived the said L. H., each of the said portions being subject, however, to the right of dower of the said C. H., widow of the said L. H.

That the defendant, J. F., of , is the owner of a mortgage upon the above described property, executed by the said L. H. and C. H., his wife, to him, dated , 18 , and upon which is due and unpaid the sum of dollars, with interest thereupon from the day of 18 .

That the dower of the said C. H., widow of L. H., in the said premises, has never been admeasured.

That the said S. H. and E. H. are infants, said S. H. being upward of fourteen years of age, and said E. H. being under fourteen years of age.

And the plaintiff prays that partition may be made among the parties, according to their respective rights and interests therein, and that commissioners may be appointed by the court for the purpose of making such partition, or, in case a partition of said premises, or of any part thereof, cannot be made without great prejudice to the owners thereof, then that the said premises, or such part thereof as cannot be divided, may be sold by and under the direction of this court, and that the proceeds of the sale, after paying the costs and expenses of this suit, may be divided among the owners thereof, according to their respective rights and interests therein, and that the plaintiff may have her costs of this suit, and such other and further relief as may be just.

F. G., Attorney for Plaintiff,

[*Office address.*]

[*Verification as prescribed by the Code.*]

No. 6.

Notice to be annexed to Summons served by Publication, or without the State upon unknown Owners in Partition Suit.

New York Code Civ. Pro. §§ 442, 1541.

To : :

The foregoing summons is served upon you by publication, pursuant to an order of [name of judge, or his official title], dated the day of , 18 ,

and filed with the complaint in the office of the clerk of , at .

The object of this action is to obtain the partition, or sale and division of the proceeds of the property described as follows [*description*], and to obtain such other or further relief as may be proper, with costs of this action.

Dated , 18 ,

— — — — — , Plaintiff's Attorney.

No. 7.

General Form of Complaint.

[*Title.*]

The plaintiff above named complains of the defendants, and alleges :

First. That the plaintiff and the defendants Y. and Z. are the owners of and possess as tenants in common [*or joint tenants*], the following described real estate, situated in the county of , to wit [*particularly describe the premises*]; and that the plaintiff desires a partition of the same.

Second. That the plaintiff has an estate of inheritance therin to the extent of one undivided third interest in the fee thereof [*or otherwise, as the case may be*], and that each of the said defendants Y. and Z. have a similar estate of one undivided third interest therein [*or otherwise, according to the fact.*]

Third. That there are no liens or incumbrances thereon appearing of record, and that no person other than the plaintiff and said defendants are interested in said premises as owners or otherwise.

Wherefore, the plaintiff prays judgment :

For a partition and division of the said premises, according to the respective rights of the parties aforesaid ;

or, if a partition cannot be had without material injury to those rights, then for a sale of the said premises and a division of the proceeds between the parties, according to their rights, after payment of the costs of this action.

No. 8.

Another Form.

[*Title.*]

The plaintiff above named complains of the defendants, and alleges :

First. That on or about the day of , 18 , one C. B. died intestate, seized in fee of the following described real property [*give description thereof*] :

Second. That the said C. B. left M. B., his widow, one of the defendants, who is entitled to dower in said premises.

Third. That the said deceased C. B. left as his children and only heirs at law the plaintiff and [*set out names of all the heirs, and if any are minors so state*], and tenants in common with the plaintiff in said premises.

Fourth. That the plaintiff and defendants each are entitled as such heirs, subject to said dower, to an undivided [*state proportionate share of each*] of the said real property. [*If there are incumbrances upon the premises the holders should be made parties, and a particular statement of the incumbrances made.*]

Wherefore, the plaintiff demands judgment: that the shares of the parties as above alleged in and to said real property be confirmed; that partition thereof be made, or, if the same cannot be equitably divided, then that a sale of said premises and division of the proceeds may be made between them, according to their respective shares, and that such other orders may be made as shall be deemed just in the premises.

No. 9.

Another General Form.

[Title.]

First. That the plaintiff and the defendants Y. and Z., own and possess, as joint tenants [*or, as tenants in common*], the following described premises [*particular description of the premises*] ; and that the plaintiff is desirous of a partition of the same.

Second. That the plaintiff has an estate of inheritance therein of one undivided fourth interest in the fee thereof [*or other estate*].

Third. That each of the defendants [*co-tenants*] have a similar estate of one undivided fourth interest in the same [*or otherwise*].

Fourth. [*Where there are unknown owners.*] That W. X., who, in his life-time, had an estate of inheritance therein of one undivided fourth interest in the fee [*or otherwise*], several years since removed from this State to ; that he subsequently married, and had children, some of whom are now living ; but their names and places of residence are wholly unknown to the plaintiff, and although he has made diligent inquiries for that purpose, he cannot ascertain the same, or either of them ; that said W. X. and his said wife are now dead ; and that said children and heirs, or the heirs at law of any who may be dead, are collectively entitled to the undivided fourth part of said premises to which said W. X. would be entitled, if living.

Fifth. [*Where an infant is a party.*] That the plaintiff owns no other land in this State in common with the said [*co-tenants*].

Sixth. [*Where the lands are subject to dower.*] That the defendant [*doweress*] is the widow of M. N., the father of the said [*co-tenants*], from whom they inherited said premises ; and, as such widow, claims a right of

dower which has not been admeasured in [*the following described part of*] said premises.

Seventh. [*Where they are subject to a judgment.*] That the defendant [judgment creditor] holds a judgment recovered by him [*or, by one M. N., and thereafter duly assigned to him*], duly given in the court [*or, in an action before O. P., justice of the peace in and for the town of*], on or about the day of , 18 , against [*one or more of the co-tenants*], for the sum of dollars ; which judgment was, on the day of , 18 , docketed in said county of [*the place where the premises are situated*], and remains unpaid and unsatisfied of record.

Eighth. [*Where they are subject to a mortgage.*] That the defendant [mortgagee] holds a mortgage upon the said interest of [*one of the co-tenants*] for dollars, payable on the day of , 18 , with interest from the day of , 18 .

Wherefore, the plaintiff asks judgment for [an accounting, and] a partition and division of said promises according to the respective rights of said parties ; or, if a partition cannot be had without material injury to those rights, then a sale of said premises, and a division of the proceeds between the parties according their rights, after payment of the costs of this action.

The Same, Setting forth Sources of Title.

First. That on or about the day of , 18 , C. B., being owner in fee of the real property hereinafter described, died intestate as to the same, which real property is described as follows : [*description.*]

Second. That the said C. B. left W. B., his widow, one of the defendants, who is entitled to dower in said premises.

Third. That subject to said dower the premises descended to the following named persons, the only heirs of the deceased :

1. The plaintiff, A. B., who is a son of said C. B., deceased.

2. The defendant, E. B., a daughter of the said C. B., deceased, and wife of one L. B., of county, in the State of

3. The defendants, F. M. and G. M., minor children of one F. B., a daughter of said C. B., deceased. The said F. B. intermarried with the defendant, H. M., and afterward died intestate, leaving issue of said marriage F. M. and G. M., her only children and heirs, who reside in the county of , and for whom their father, H. M., who resides in the county of , has been duly appointed guardian by the probate court of said county. The said H. M. is tenant by the courtesy of the estate of said children.

4. G. B., a son and only heir of one H. B., deceased. The said H. B. was a son of said D. B., deceased. The said G. B., after said estate was cast upon him by descent as aforesaid, conveyed his estate in said premises, by deed duly executed, to the defendant X., who resides in .

Fourth. The parties above named have now the following undivided estate in said premises :

1. The plaintiff, one undivided [fourth] in fee.
2. The defendant E. B., one undivided [fourth] in fee.
3. The defendants F. M. and G. M., each one undivided [eighth] in fee, subject to the courtesy of their father, H. M.
4. The defendant X., one undivided [fourth] in fee.

For Admeasurement of Dower.

First. That the plaintiff was married to C. B. in the year , and lived and cohabited with him until his death, which was on the day of , 18 .

Second. That the said C. B., during said coverture of the plaintiff, was seized of an estate of inheritance of and in the lands situated in , and bounded and described as follows : [description of the premises.]

Third. That the defendant Z. is a son and heir of said C. B., of full age ; and the defendant Y. is an infant son and heir of said C. B.

Fourth. That said C. B. left a will, which was duly proved and recorded in the office of the surrogate of , on or about the day of , 18 , by which he devised the premises [*or designate what portion was devised*] to the defendant W. for life, with remainder over to the defendants.

Wherefore, the plaintiff asks judgment for one equal undivided third of the premises, as and for her dower, and that it may be admeasured and set off to her, and for her costs.

To compel the Determination of Claims to Real Property.

First. That on the day of , 18 , one M. N. was seized in fee simple [*or otherwise*] and possessed of the following described premises : [*particular description of premises.*]

Second. [*Where plaintiff claims by descent or devise.*] That on that day, being so seized and possessed, said M. N. died, leaving the plaintiff his sole heir [*or, leaving his last will duly made, which was on the day of , 18 , duly proved and admitted to probate by the surrogate of county, which will contained a devise to the plaintiff of said premises ; or, of an estate of life, or otherwise, in said premises, of which the following is a copy : [copy of devise.]*]

[*Or, where he claims by grant.*] That on that day, being so seized and possessed, said M. N., by his deed under his hand and seal, dated on that day, duly bargained, sold and conveyed said premises to the plaintiff.

Third. That as such heir [*or, devise ; or, grant ; or, grantee*], the plaintiff has an estate therein in fee [*or, for life ; or, for years*].

Fourth. That said premises now are, and at and for

three years before the time of bringing this action, were in the actual possession of the plaintiff, and for three years next previous were in the actual possession of the plaintiff and the said M. N.

Fifth. That the defendant unjustly claims title to said premises in fee [*or*, to an estate for life in said premises ; *or*, to an estate for years in said premises].

Wherefore, the plaintiff demands judgment that the defendant, and all persons claiming under him by title accruing subsequent to the commencement of this action, be forever barred from all claim to any estate of inheritance or freehold, or to any term of years not less than ten, in the said premises, and for costs of this action.

Another Complaint in Partition.

[*Title of action.*]

The complaint of A. B., the plaintiff herein, respectfully shows, that G. B., late of the city and county of New York, deceased, late father of the plaintiff, was, in his life-time and at his death, seized in fee simple of the following described real estate, to wit : [*describe premises particularly.*]

That the said G. B., being so seized as aforesaid of the above described property, died on or about the tenth day of December last past, leaving C. B., his widow, and this plaintiff, and the defendants E. B., D. B. and L. B., his children, him surviving ; that at the time of the death of the said G. B. all the defendants were of full age, and they then resided and all do still reside within this State.

And the plaintiff further shows that the dower of the said widow, C. B., has never been admeasured or in any way set apart for her use from the estate of the said G. B. ; that this plaintiff is seized in fee simple and entitled to the undivided one fourth part of the said estate ; that the defendant E. B. is seized in fee simple and entitled to the undivided one fourth part of said estate ; that the defendant D. B. is seized in fee simple and entitled to the undi-

vided one fourth part of the said estate ; and the defendant L. B. is also seized in fee simple and entitled to the undivided one fourth part of the said estate ; that each of said undivided one fourth parts of said estate is subject to the dower right of the said C. B., and that there are no other specific liens and incumbrances against the said estate, or any part thereof ; and that the real estate described in this complaint is the only real estate owned in common by the aforesaid parties to this action, and comprises all the real estate of which the said G. B. died seized in fee simple.

That the plaintiff is desirous and prays judgment that a partition or division should be made of the several parcels of land and real estate among the several parties seized of or entitled thereto, according to their respective rights, estates and interests therein ; or, in case the said several parcels of land cannot be divided among the owners thereof without material injury to the parties interested therein, then that such part or portions as cannot be so divided may be sold and the proceeds thereof divided among such parties according to their respective rights and interests ; and that the dower interest of the said C. B. may be apportioned upon specific pieces of the said premises ; or, in case it cannot be apportioned upon specific portions of the said premises, then that a portion of the said sum for which the said premises shall be sold be set apart, the annual income of which to go to the said widow ; provided, however, that the said widow shall not elect to receive a gross sum in lieu and instead of the income of the amount to be set apart as aforesaid ; but in case the said C. B. shall elect to receive a gross sum for her dower interest, that this court so adjudge and decree ; and for such other and further relief and judgment in the premises as the nature of this case may require and be agreeable to equity, and that the plaintiffs may be allowed their costs and disbursements in this action.

L. H., Plff's Att'y, New York.

No. 10.

General Answer of Infant or Lunatic.

[Title.]

The defendant , an infant [*or, lunatic*], answering by his guardian *ad litem* [*or, committee*], says, that he is a stranger to all and singular the matters and things in the complaint in this action set forth, and that he is an infant under the age of twenty-one years, [*or, that he is a lunatic, etc.*] and claims such interest in the premises as he is entitled to, and he submits his rights and interests in the matter in question to the protection of the court.

No. 11.

Answer Denying Complaint and Alleging Ownership.

[Title.]

The defendant , appearing in this action by , his attorney, makes answer, and complains as follows :

First. He denies the same, and each and every allegation therein contained.

Second. The said defendant further alleges, that he is the owner in fee and possessed of the premises set forth in the plaintiff's complaint, and the whole thereof.

Wherefore, this defendant demands judgment that the plaintiff's complaint be dismissed, and that he have his costs of this action, with such other further or different relief as may be just and in accordance with equity.

No. 12.

Penuency of Action for Dissolution of Partnership.

[*Title.*]

The defendant for his answer to the plaintiff's complaint alleges, that the premises of which the plaintiff prays a partition, being the same which were described in his complaint, were purchased by the plaintiff and this defendant as partners, with partnership funds, and for partnership purposes in carrying on and conducting the business of [state what] as such partners, and the same is still so used for said partnership purposes.

This defendant further alleges, that prior to the commencement of this action, to wit, on the day of , 18 , this defendant commenced an action in the court against the plaintiff for a dissolution of said partnership and an accounting, and which said action and accounting involved the real property described in the complaint, and which said action is still pending and undetermined.

Wherefore, this defendant prays judgment dismissing the plaintiff's complaint, together with his costs of this action.

No. 13.

Answer wherein the Defendant concurs in the Plaintiff's Prayer for Relief.

[*Title.*]

The defendant answers to the plaintiff's complaint in this action, and alleges :

That he admits that he is a tenant in common with the plaintiff, and is the owner of the undivided part of said property in fee.

Wherefore, this defendant concurring in the prayer for partition, asks judgment, etc.

No. 14.

Affidavit to Move for Reference.

[*Title of cause.*]

State of _____, County of _____, ss :

A. B., of the city of . . ., in the county of . . ., State of . . ., being duly sworn, says, that he is the attorney for the plaintiff in this action ; that this action has been brought to obtain partition or sale and division of the proceeds of the real property described in the complaint among the owners thereof, according to their respective interests therein ; that said action was commenced by the service of the summons, with notice of object thereto attached [*or, with a copy of the complaint*] upon all the defendants herein ; that more than twenty days have elapsed since such service became complete, as appears by the proof of service hereto annexed, and that none of the defendants have appeared or answered [*or, if any defendant has appeared, so state*].

In case of infancy or absentees.] Deponent further says, that the defendant, C. D., is an infant [*under or over the age of fourteen years*] for whom M. N., an attorney and counselor of this court, has been duly appointed guardian *ad litem*, and has appeared in said action and put in the usual general answer in behalf of said infant defendant.

In case of unknown owners.] Deponent further says, that the owners of one _____ part of said property are unknown to the plaintiff.

In case of absentees.] Deponent further says, that the defendant, J. T., is an absentee ; that service of the summons in this action was made upon him by publication, pursuant to an order of the Hon. _____ [judge, *or, justice*] of _____ court, which order is duly filed in the county clerk's office of _____ county, being the county in which the land set forth in the complaint is situated. Proof of

service upon the said absent defendant pursuant to the order aforesaid is hereto annexed.

Deponent further says, that with the exception of the said infant defendant, C. D., all of the defendants in this action are in default. [Or if they have appeared and not answered, so state.]

[*Furat.*]

No. 15.

Notice of Motion for Reference.

New York Code Civ. Pro. § 1545.

[*Title of cause.*]

Sirs: Take notice, that upon the summons and complaint in this action, with proof of due service thereof [*or*, of said summons and notice of object of action] upon the defendants, and upon the affidavit, with a copy of which you are herewith served, the same being hereto annexed, and upon all the papers and proceedings in this action, a motion will be made at the next special term of this court, to be held at the court-house, in the city _____, in the county of _____, on the _____ day of _____, 18_____, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order of this court appointing a referee to ascertain the rights, shares and interests of the several parties in the property sought to be partitioned in this action, and an abstract of the conveyances by which the same are held, and to take proof of the plaintiff's title and interest in said premises and of the several matters set forth in the complaint, and to report whether said property, or any part thereof, is so circumstanced that a partition thereof cannot be made without great prejudice to the owners, and for such other and further relief as may be proper.

K. M., Plaintiff's Attorney.

[*Office address.*]

Dated _____, 18_____.

To W. A., Attorney for the Defendant, C. D.

K. L., Attorney for the Defendant, A. F.

No. 16.

Order of Reference.

New York Code Civ. Pro. § 1545.

At a special term of the supreme court, etc.

[*Title of cause.*]

Upon filing due proof of the personal service of the summons and the notice of object of action [and complaint] in this action upon the defendants, and of filing of notice of pendency of the action in the county clerk's office more than twenty days since, and on reading and filing the affidavit of A. B., attorney for the plaintiff, dated the day of , 18 , and sworn to before , notary public, and it appearing by said affidavit that the defendants are all in default, none having appeared, answered or demurred, and that none of the defendants are infants or absentees [*or if any are infants or absentees or have appeared, state that fact.*]

Now, on motion of K. M., of counsel for the plaintiff, there being no opposition.

It is Ordered, That , of , a counselor of this court, be and he is hereby appointed referee in the above entitled action to ascertain and report the rights, shares and interests of the several parties to this action in the property described in the complaint and of which partition is sought, and an abstract of the conveyances by which the same are held, and to take proof of the plaintiff's title and interest in said premises and of the several matters set forth in the complaint, and to report whether the property, or any part thereof, is so circumstanced that a partition thereof cannot be made without great prejudice to the owners; and, if he arrives at the conclusion that a sale of said property, or any part thereof, is necessary, then that he ascertain whether there is any creditor, not a party, who has a lien upon the undivided share or interest of any party.

No. 17.

Order of reference preliminary to Judgment
for Partition.

At a special term, etc.

[Title of the cause.]

On reading and filing due proof by the affidavit of M. N. that the summons [*and complaint*] herein has been duly personally served within this State on all the defendants [except the unknown owner and the defendant U. V., a non-resident, on each of whom it has been duly served by publication], and that none of the defendants are infants [except the defendant W. X.], and that none of them have demurred or put in any answer controverting any material allegation of the complaint, now, on motion of M. N., for the plaintiff, and on proof of due notice of this motion to the defendants who have appeared, and after hearing O. P. [*or, no one appearing*] in opposition :

Ordered, That it be referred to R. F., Esq., of , counselor at law, to take proof of the plaintiff's title and interest in the premises mentioned in the complaint, and of the several matters set forth in said complaint, and to ascertain and report what share or part of the said premises belongs to each of the parties to this action, so far as the same can be ascertained, and the nature and extent of their respective rights and interests therein, and an abstract of the conveyances by which the same are held.

[*And, if a sale is deemed necessary, add :*] And said referee is further directed to inquire and report whether the whole of said premises, or any lot or separate parcel thereof, are so circumstanced that an actual partition cannot be made; and if he arrives at the conclusion that

a sale of the whole premises, or of any lot or separate parcel thereof, will be necessary, then to specify the same in his report, together with the reasons which render a sale necessary ; and in such a case, that he also ascertain and report whether any creditor not a party to this action has a specific lien by mortgage, devise, or otherwise, upon the undivided share or interest of any of the parties in that portion of the premises which it is necessary to sell; and if he finds that there is no such specific lien in favor of any person not a party to the action, that he further inquire and report whether the undivided share or interest of any of the parties in the premises is subject to any general lien or incumbrance, by judgment or decree; and that he ascertain and report the amount due to any party to the action, who has either a general or specific lien on the premises to be sold, or any part thereof, and the amount due to any creditor, not a party, who has a general lien on an undivided share or interest therein, by judgment or decree, and who shall appear and establish his claim on such reference. And said referee, if requested by the parties, or any one of them, who appear before him on such reference, shall also ascertain and report the amount due any creditor not a party to the action, which is either a specific or general lien or incumbrance upon all the shares or interests of the parties in the premises to be sold, and which would remain as an incumbrance thereon in the hands of the purchaser.

[*Where two or more owners wish their shares set off in common, add :]* And said referee is further directed to inquire and ascertain whether the premises are so situated that the shares of A. B. and C. D. can be set off to them in common, without any partition or allotment as between them, and without injury to the interests of any of the parties, and that he report the facts, with his opinion thereon.

No. 18.

Oath of Referee.

New York Code Civ. Pro. § 1016.

[*Title of cause.*]

I, _____, the referee appointed by order of the court in the above entitled action, do solemnly swear that I will faithfully and fairly try the issues [*or*, determine the questions referred to me] in the above entitled action, and will make a just and true report, according to the best of my understanding.

_____, Referee.

[*Jurat.*] _____

No. 19.

Referee's Report as to Title, etc.

New York Code Civ. Pro. § 1545.

[*Title of cause.*]

I, M. R., the referee appointed in this action by order of the court, made and entered herein on the _____ day of _____, 18_____, respectfully report :

That having been attended by counsel for the several parties, who have appeared [and by E. F. [attorney for the] guardian ad litem of the infant defendants, S. H. and E. H.] I proceeded to a hearing of the matters and things so referred to me.

That I have ascertained the rights, shares and interests of the several parties in the property sought to be partitioned in this action to be as follows :

The plaintiff and the defendants, A. H. and E. C. are each of them seized in fee simple absolute, and are in possession of the equal, undivided one-fourth part of the

said property, and the defendants, S. H. and E. H., are each of them seized in fee simple absolute and are in possession of the one equal undivided eighth part thereof, each of the said portions being subject to the right of dower of the defendant, C. H., widow of L. H., and the interest of the defendant, A. H., being subject to the inchoate right of dower therein of his wife, the defendant, M. H.

That the defendant, J. F., is the owner of a mortgage upon the said property [*or*, upon the interest of the defendant, A. H., in said property], executed by to , dated , 18 , and recorded in county clerk's office, on the day of 18 , in book of mortgages No. , at page , and upon which is [due and] unpaid the sum of dollars.

That the defendant, C. H., has a dower interest in said property, as the widow of L. H., which has never been admeasured; and the defendant, M. H., has an inchoate right of dower in the interest of her husband, the defendant, A. H.

And I further report, that the premises are so circumstanced that a partition thereof cannot be made without great prejudice to the owners thereof, for the following reasons [*here state reasons*], and I further report, that I have caused a notice to be published, as required by law, once in each week for six successive weeks, in the newspaper printed at Albany, in which legal notices are required to be published, and also in a newspaper published in the county of , in which said property is situated, requiring each person not a party to the action who, at the date of the order of my appointment, had a lien upon any undivided share or interest in the property, to appear before the undersigned referee, at , on or before the day of , to prove his lien, and the true amount due, or to become due, to him by reason thereof. And I report, that no creditor not a party has appeared before me pursuant to such notice, or made proof of any lien as required by said notice.

And I further report, that the following is an abstract of the conveyances by which the title to the said premises is held, to wit:

J. M. and F. M., his wife,
to
L. H.

Warranty deed dated , 18 . Consideration dollars. Duly acknowledged and recorded , 18 , in the clerk's office of county, in book No. of deeds, at page .

L. H., the father of the plaintiff, died intestate, on or about , 18 , and seized in fee of the property described in the above mentioned deed and in the complaint, leaving the plaintiff and the defendants [*naming them*] his sole heirs at law, and his widow, the defendant C. H., him surviving.

All of which is respectfully submitted.

Dated , 18 .

M. H., Referee.

No. 20.

Report—That a Partition can be made.

[*Title of action.*]

To the supreme court of the State of New York :

In pursuance of an order of this court made in the above action, on the day of , 18 , by which it was referred to me, to take proof of the plaintiff's title and interest in and to the premises in the plaintiff's complaint mentioned, and of the several matters set forth in the said complaint, and to ascertain and report what share or part of the said premises belongs to each of the parties to this action, so far as the same could be ascertained, and the nature and extent of their respective

rights therein, and an abstract of the conveyances by which the same are held ; and also to inquire and report whether the said premises, or any lot or separate parcel thereof, are so circumstanced that an actual partition thereof cannot be made,* I, the subscriber, referee, as aforesaid, do report :

That, having been attended by the attorneys of the several parties who appeared in this action, I proceeded to a hearing of the matters so referred.

I further report, that on such hearing I took proof of the facts stated in the complaint, and find that the material facts set forth are true.

And I further certify and report, that the following is an abstract of the conveyances, by which the premises described in the complaint are held, that is to say :

J. B., and A., his wife,
to
L. M.

Warranty deed, dated , 18 . Consideration dollars. Duly acknowledged and recorded , 18 , in the clerk's office of county, in book W. W. of deeds, page , etc., which contains a description of the same premises set forth in the complaint in this action.

L. M., the father of the plaintiff, died on or about the day of , 18 , and by his will gave a life estate in all his real estate to his wife, M., the mother of the said A. M., and at her death to be equally divided among all the children of the said testator, share and share alike. Said last will and testament was proved and recorded as a will of real estate, on the day of , 18 , in the office of the surrogate of the county of .

The said M., wife of the said testator, died on or about the day of , 18 , leaving her surviving as the children and heirs at law of the said

testator the following, to wit : A. and B., sons of L. M., deceased, and N., wife of O. M., daughter of the said L. and M., and C. and D., sons of E., deceased, and grandchildren of the said L. M. and S., widow of the said E., deceased.

The legal estate and interest of the parties in the premises are as follows :

The plaintiff A. and the defendant B. are each entitled to one undivided fourth part thereof in right of the said C.

The defendant S., as widow of the said E., deceased, is entitled to a dower right in one undivided fourth thereof, and the said C. and D. are each entitled to one undivided eighth part, subject, however, to the dower of S., their said mother.

The estate is in the parties in fee, subject to the marital and dower interests as appear above.

I further report, that the premises described in the complaint are so circumstanced that in my opinion a partition thereof can be made without material injury to the rights or interests of the several owners thereof ; and that a sale of such premises would not be more advantageous to such owners than a partition thereof.

All which is respectfully submitted.

Dated , 18 .

A. B., Sole Referee.

No. 21.

Report—That Sale is necessary in Partition.

*[As in the last form to the *, then]* And if the said referee should arrive at the conclusion that a sale of the whole of the said premises, or any lot or separate parcel thereof, will be necessary, that he specify the same in his report, together with the reasons rendering a sale necessary ; and in such a case that he also ascertain and report whether any person not a party to this action has a

specific lien on the undivided share or interest of any of the parties in that portion of the premises which it is necessary to sell ; and that he further inquire and report whether the undivided share or interest of any of the parties in the premises is subject to any general lien or incumbrance by judgment or decree ; and that he ascertain and report the amount due to any person which is either a specific or general lien or incumbrance upon all or any of the shares or interests of the parties in the premises to be sold, and which would remain as an encumbrance thereon in the hands of the purchaser. I, the subscriber, referee, as aforesaid, do respectfully report :

That, having been attended by the attorneys for the several parties who appeared in the action, I proceeded to a hearing of the matters so referred, after having caused a notice to be published as required by law, for all general lien creditors, by judgment, decree or otherwise, on the undivided share or interest of any of the parties in the premises, to produce to me proof of their respective liens and incumbrances, together with satisfactory evidence of the amount due thereon, and to specify the nature of such incumbrances, and the dates thereof respectively.

I further report, that on such hearing, I took proof as to the facts stated in the complaint, and find the material facts therein set forth are true.

And I further certify and report, that the following is an abstract of the conveyance by which the premises described in the complaint are held, that is to say :

The last will and testament of W. S., the common source of title, who died seized and possessed of the premises in the complaint described.

By such will he devised unto his wife, B. S., since deceased, all the rents, issues and profits and income of his real estate during her natural life, and after her death he gave, devised and bequeathed the same to his four children, E. F. G., wife of R. M., and H., each one fourth part thereof, to have and to hold the same unto his said children each one-fourth part thereof, and to their respec-

tive heirs forever. Will dated , 18 , proved and recorded in the county surrogate's office, on the day of , 18 . That in , the said W. S. died, leaving his four children and his wife him surviving ; that in , 18 , the said B. S., widow of the said testator, departed this life; that F. S., one of the children of the said W. S., has also departed this life, leaving him surviving his widow, M. S. and two children, to wit : P. S. and R. S.

And I do further certify and report, that the legal estate and interest of the parties in the premises are as follows :

The plaintiff E. S. is entitled to one undivided fourth part.

The defendant R. M., and G. M., his wife, in right of the said G., are entitled to one undivided fourth part.

The defendant H. is entitled to one undivided fourth part.

The defendant M. S., widow of the said F. S., deceased, is entitled to dower in the one fourth part of which he died seized.

The defendant P. S. and R. S., children of the said F. S., deceased, are each entitled to one eighth part, subject to the dower of the said M. S., their mother.

The estate is in the parties in fee, subject to the marital interests therein, and the dower interests which appear above.

And I do further certify and report, that the premises described in the complaint in this action are so circumstanced that, in my opinion, a partition thereof cannot be made without great injury and prejudice to the owners thereof. The premises consist of three city lots, and to lessen their present size would render them valueless. These facts, in connection with the number of the owners and persons interested, render a partition difficult and impracticable.

I do further certify and report, that I have caused the necessary searches to be made, and I find two creditors, not

a party to this action, and no more, have any specific lien by mortgage, devise or otherwise, upon the undivided share or interest of any of the parties in the premises, and that those two creditors are G. B., of the city of , and S. G., of the same place, as follows :

E. S. and wife	}
to	
G. B.	

Bond and mortgage, dated , 18 , given to secure the payment of the sum of dollars, in two years from the date thereof.

Mortgage recorded in the office of the clerk of the county of , on the day of , 18 . That the whole of said mortgage, with interest from , 18 , is unpaid.

Supreme Court.

S. G.	}
v.	
H. G.	

Judgment for dollars, obtained and docketed in county, , 18 , all which is unpaid.

That there is no other general lien or incumbrance by judgment or decree upon the undivided share or interest of either of the parties in the premises.

And I further report that no creditor, not a party to this action, having any general lien on any undivided share or interest in the premises, by judgment or decree, appeared before me on the said reference, to establish his claim in pursuance of the notice published by me, except as aforesaid.

All of which is respectfully submitted.

Dated , 18 .

A. B., Referee.

No. 22.

Final Judgment for Actual Partition.

At a special term, etc.

[*Title of the cause.*]

This action having to be brought on to be heard upon the report of G. H., I. J., K. L., commissioners appointed by an order of this court, and on reading and filing said report, which bears date the day of , 18 , by which it appears that the said commissioners have made partition of the premises described in the complaint in this action between the parties, according to their respective rights and interests therein, as the same have been ascertained, declared and determined by this court, and by which said partition the said commissioners have divided the whole of said premises into allotments of equal value, and have set off in severalty to the said W. X., one of the said allotments, bounded and described as follows : [description] as will more fully appear by a map of said partition thereto annexed ; and, also, by which partition the said commissioners have set off in severalty to [proceeding in like manner to state each allotment] ; now, on motion of M. N., for the plaintiff,

It is Ordered and adjudged, That the said report, and all things therein contained, do stand ratified and confirmed, and that the partition so made be firm and effectual forever.

And it is further Ordered and adjudged, That the said [naming the parties] do each execute, under their hands seals, and acknowledge and deliver to the other, a deed of release and quit-claim of the parcels of land set off to each in severalty as aforesaid.

*And it is further Ordered and adjudged, That the said pay to the said the sum of dollars, being the one part of the costs and charges of the proceedings in this action ; and that the said have execution therefor.

No. 23.

**The Same as No. 22; where Compensation
is to be made for Equality.**

*[Insert in preceding form, at the *]*

And it appearing from the said report that the share of W. X. is worth more in proportion than the respective shares allotted to the other parties, it is further adjudged that the said W. X. make compensation for equality of partition to the other parties entitled to share in the land [*or, its proceeds*], and pay to each of them therefor, dollars, together with dollars his share of the costs and charges of this action hereby taxed. dollars, said share being one [fourth] part of said costs and charges, with the additional ratable increase; and that each of the said other parties have execution for the sum so adjudged against said W. X.; and that the same is hereby declared to be a lien upon the share so allotted to said W. X.

No. 24.

Interlocutory Judgment in Partition Suit.

New York Code Civ. Pro. § 1546.

At a term of the court, held at ,
on the day of , 18 .

Present, Hon. A. O., Judge [*or, Justice*].

[Title of cause.]

Upon filing the report, dated , 18 , of M. R.,
duly appointed as referee in the above entitled action, by
order of the court, made and entered on the day
of , 18 , and it appearing that due notice of this
application has been given to the parties who have

appeared herein, and to E. F., the [attorney for the] guardian ad litem of the infant defendants, S. H. and E. H., who has appeared herein, and put in the usual general answer for said infants, and on motion of , for the plaintiff, after hearing M. J., for the defendant, J. P., and [for] the said guardian ad litem [and the court being satisfied that the interests of the said infant plaintiff will be promoted thereby].*

It is hereby Ordered and adjudged, That partition be made of the property mentioned and described in the complaint herein [except the portion hereafter directed to be sold], to wit: *[insert description of property,]* between the parties entitled thereto, according to their respective rights, shares and interests in said property, which said rights, shares and interests are as follows, so far as the same have been ascertained, to wit *[here set forth the interests of the parties as they appear by the Report Form No. 19,]* and that T. R., F. J. and I. M., three reputable and disinterested freeholders, be and they are hereby designated as commissioners to make the said partition.

[And it appearing to the court, by said report, that the defendants, A. H. and E. C., desire to enjoy their shares in common with each other, it is hereby directed that partition be so made as to set off to said A. H. and E. C. their shares of the property partitioned, without partition, as between themselves, to be held by them in common.]

And if the said commissioners find that partition cannot be made equal between the parties, according to their respective rights, without prejudice to the rights and interests of some of them, then they shall report the amount of compensation to be made by the parties respectively for equality of partition ; but they shall not report that compensation be made by a party who is unknown, or whose name is unknown, nor by an infant, unless it appears that he has personal property sufficient to pay it, and that his interests will be promoted thereby.

And it is further directed that all the parties to this action shall produce to and leave with the said commissioners, for such time as the commissioners shall deem reasonable, all deeds, writings, surveys or maps relating to the premises, or any part thereof. †

[*Or where sale of the whole property is necessary, as above to *, and from thence as follows :*]

It is hereby Ordered and adjudged, That the respective rights, shares and interests of the parties to this suit in the property mentioned and described in the complaint herein, so far as the same have been ascertained, are as follows, to wit : [*here set forth the interests of the parties as they appear by the report Form No. 19.*]

And it having been found by said report that the said property is so circumstanced that a partition thereof cannot be made without great prejudice to the owners, it is ordered and adjudged, that the said property mentioned and described in the complaint herein, to wit : [*insert description of property,*] and all the estate, right, title and interest of the parties to the suit therein, whether present or future, vested or contingent, of dower, courtesy or otherwise, including the dower interest therein of the defendant, , and the rights to which any other person might hereafter become entitled in said premises, be sold †† at public auction, in the county of , where such premises are situated, by and under the direction of J. R., who is hereby appointed as referee for the purpose of making such sale.

That the said referee give [six] weeks' previous notice of the time and place of such sale in one of the public newspapers published in the county of where such premises are situated, and in such other manner as is required by law and the rules and practice of this court.

That said sale may be upon credit for a time not exceeding years, and for an amount not to exceed the one part of the purchase money of said premises to be secured, at interest, by mortgage [or by one or more mortgages], to the parties entitled to said one

part of said purchase money upon the premises sold, and also by the [joint and several] bond or bonds of the purchaser or purchasers to the said parties, conditioned for the payment of said one part, or less, of said purchase money in not to exceed years from the date of such sale [*add any additional security which the court may prescribe*] ; and that the plaintiff, or any of the parties to this action, may become the purchaser or purchasers thereof [and that said referee pay into court the portion arising from the sale of the share or interest of the [defendant], A. H., after deducting the portion of the costs and expenses for which it is liable].

And it is further ordered, that the said referee, immediately after completing such sale, file with the clerk of this court his report thereof, under oath, containing a description of each parcel sold, the name of the purchaser thereof, and the price at which it was sold.

[*Or when a sale of a part of the premises is necessary, as above to †, and from thence as follows :*] And it having been found by said report that the parcel of said property described as follows [*describe the same*], is so circumstanced that a partition thereof cannot be made without great prejudice to the owners, it is hereby directed that the said premises last above described be sold, [*etc., as above from †† to the end*].

No. 25.

Interlocutory Judgment where Partial Partition is Adjudged.

New York Code Civ. Pro. § 1517.

*As in Form No. 24 to *, and from thence as follows :*

And the right, share and interest of the defendant, C. H., having been ascertained and determined as follows: [*state same, as it appears by the report*] and the rights,

share and interests of the other parties as between themselves remaining unascertained and undetermined :

It is hereby Ordered and adjudged, That a partition be made as between the said C. H., and the other parties to this action, and that F. R., F. J., and I. M., three reputable and disinterested freeholders, be and they are hereby designated as commissioners to make the said partition.

[Add same provisions for compensation for equality of partition and for production of deeds, etc., as in Form No. 24, and continue as follows :]

And it is further directed, that this action be severed, and that upon the coming in of the report of said commissioners that final judgment be rendered, with respect to the portion of the property set apart to the said C. H., leaving the action to proceed as against the other parties, with respect to the remainder of the property.

[Add any further provisions that may be necessary to carry out the partial partition.]

No. 26.

Oath of Commissioners.

New York Code Civ. Pro. § 1550.

[Title of cause.]

We, the commissioners, appointed by an interlocutory judgment made and entered herein, on the day of , 18 , to make partition of the property described in said judgment, do severally swear, that we will faithfully, honestly and impartially discharge the trust reposed in us as such commissioners.

[Jurat.]

[Signatures.]

No. 27.

Report of Commissioners making Partition.

New York Code Civ. Pro. § 1554.

[*Title of cause.*]

To the supreme court of the State of New York [*or name other court*]:

In pursuance of an interlocutory judgment of this court, made in the above entitled action, and entered in the county clerk's office, on the day of , 18 , we, the undersigned commissioners thereby appointed and designated to make partition of the premises described in said judgment, among the parties entitled thereto according to their respective estates and interests therein, do hereby report :

That having been first duly sworn ; and having severally taken and subscribed the oath required by law, that we would faithfully, honestly and impartially discharge the trust reposed in us, which said oaths were filed with the clerk of county before we entered upon the discharge of our duties, we have carefully examined the premises described in said judgment * and caused them to be surveyed, and have made partition thereof between the said parties † according to their respective rights and interests therein, as the same have been ascertained, declared and determined by the said court, in and by said judgment, in manner following :

We divided the whole of said premises, other than the portion herein set off to the defendant, M. F., as her dower interest therein, into allotments, the lots composing which are designated on the map hereunto annexed by the letters A, B, C, etc., each of which allotments is, in our opinion, of equal value, and that being in our judgment the most beneficial division, all circumstances considered, that could be made of such premises ;

and that we have set off in severalty to the said [plaintiff] S. G., all those certain parcels of the said premises designated on said map by the letter A, and which are respectively bounded as follows [*insert description*], as will more fully appear by reference to said map.

And we have also set off in severalty to the said [defendant] J. G., all those certain pieces or parcels of said premises, designated on the said map by the letter B, which are respectively bounded as follows [*insert descriptions*], as will also more fully appear by reference to said map.

And we have set off to the defendants A. H. and E. C., all those certain pieces or parcels of said premises designated on the said map by the letter C, which are respectively bounded as follows [*insert descriptions*], as will also more fully appear by reference to said map, to be held by them in common.

And we further report, that we have set off in severalty to the defendant, M. F., as her dower-right in said property, the premises described as follows [*describe them*], and designated on said map by the letter D, and we have made partition of the said lot D among the parties entitled thereto in remainder, as follows: to the plaintiff, S. G., the lot designated on said map by the letter E, and described as follows [*describe it*], and to the defendant, J. G., the lot designated on said map by the letter F, and described as follows [*describe it*], to be enjoyed by them respectively upon the determination of said dower interest by the death of the said M. F.

[And we have set off in severalty to the defendant having the share in said property, who is unknown, the parcels of said property marked N upon said map and described as follows: [*describe same*.]]

And it appearing to us that partition cannot be made equal between the parties, according to their respective rights, without prejudice to the rights and interests of some of them, and that the payments hereinafter named are necessary to produce such equality, we have awarded

compensation to be made between the parties as follows: the plaintiff, S. G. is to pay the defendant, J. G., the sum of dollars.

And we further certify and report, that the items of the various expenses attending the execution of the said commission, including our fees as commissioners, are contained in a schedule hereto annexed, marked A, and forming part of this, our report; and that we have caused a map to be made thereof, as aforesaid, showing what parts of the said premises have been allotted to the respective parties, which map forms a part of this, our report, and is hereto annexed, marked B.

In witness, whereof, we, the said commissioners, have set our hands to this, our report, this day of , 18 .

[Signatures.]

In presence of .

[Acknowledgment as prescribed by the law.]

SCHEDULE A.

For services as commissioners, at five dollars per day for each, .	\$00 00
Cash paid for services as surveyor, .	0 00
Cash paid for two surveyors' assistants and flag-bearer, \$2 each, .	00 00
	<hr/>
	\$00 00

No. 28.

Report of Commissioners that sale of Property, or of some part thereof, is necessary.

New York Code Civ. Pro. § 1551.

[Title of cause.]

As in Form No. 27 to *, and from thence as follows:

And that it appears to [a majority of] us that the partition thereof [or, of the lot, or, tract, or, portion] thereof

described as follows [*describing it*] cannot be made without great prejudice to the owners for the following reasons, to wit: [*state reasons.*]

In witness whereof, we, the said, etc. [*as in Form No. 27.*]
[*Signatures.*]

In presence of
[*Acknowledgment as prescribed by the law.*]

No. 29.

Final Judgment upon Report of Commissioners making Actual Partition.

New York Code Civ. Pro. § 1557.

At, etc. [*as in Form No. 27.*]
[*Title of cause.*]

This cause having been brought on to be heard upon the report of , commissioners appointed therein, under and by virtue of the interlocutory judgment made and entered in this action, and upon reading and filing said report, which bears date the day of , 18 , and proof of due service of notice of application for judgment thereupon, the attorneys for all parties who have appeared herein, and upon the [attorney for the] guardian ad litem of the infant defendant having been made, and it appearing by said report that the said commissioners have made partition of the premises described in the complaint in this action, between the parties to this action, according to their respective rights and interests therein, as the same have been ascertained, declared and determined by this court, and by which said partition the said commissioners have divided the whole of said premises [other than the portion thereof set off to the defendant, M. F., as her dower interest therein] into [two] allotments of equal value, and have set off in severalty to the plaint-

iff, S. G., one of the said allotments, bounded and described as follows: [*insert description,*] as will more fully appear by a map of said partition thereto annexed, being the lots marked A on said map; and it also appearing by said report that by such partition the said commissioners have set off in severalty to the defendant, J. G., the other of the said allotments, which is bounded and described as follows, to wit: [*insert description,*] as will also more fully appear by reference to the said map of the partition annexed to such report, being the lots marked B on said map.

And it further appearing by said report, that the said commissioners have set off in severalty to the defendant, M. F., as her dower interest in said premises partitioned, the following described property, to wit: [*insert description,*] and that they have made partition of the said last mentioned lot among the parties entitled thereto, in remainder, as follows: to the plaintiff, S. G., the lot designated on the said map by the letter E, and described as follows, to wit: [*insert description,*], and to the defendant, J. G., the lot designated on said map by the letter F, and described as follows, to wit: [*insert description,*] to be enjoyed by them respectively, upon the determination of said dower interest by the death of the said M. F.

Now, on motion of G. B. J., of counsel for the plaintiff, after hearing, etc. [*or, no one appearing to oppose*].

It is ordered, adjudged and decreed, and this court by virtue of the authority therein vested, doth order, adjudge and decree, that the said report, and all things therein contained, do stand ratified and confirmed, and that the partition so made be firm and effectual forever.

And it having appeared by the said report that partition cannot be made equal between the parties according to their respective rights, without prejudice to the rights and interests of some of them, and that the following payments are necessary to produce such equality, it is hereby ordered and adjudged, that compensation be, and is hereby awarded between the parties as follows: that

the defendant, J. G., pay to said plaintiff, S. G., the sum of dollars.

And it is further ordered and adjudged, that each of the parties who is entitled to the present possession of a distinct parcel of said premises hereby assigned to him be let into the possession thereof immediately, and that the parties who are entitled to the possession of distinct parcels of said premises after the expiration of the dower interest therein of the defendant, M. F., be let into possession thereof after the determination of the said estate of the said M. F., by the death of the said M. F.

And it is further ordered and adjudged, that the said J. G. pay to the said S. G., the one-half of the costs and charges of the proceeding in this cause, the whole amount of said costs and charges being the sum of dollars, and that the said S. G. have execution therefor.

No. 30.

Final Judgment for Sale.

At a special term, etc.

[*Title of the cause.*]

This action, having been brought on for hearing upon the pleading and proceedings and the report of R. F., the referee herein [and on the exceptions taken by W. X. and S. T., a creditor having a specific lien upon the share of W. X.], by which report, dated the day of , it appears [*here briefly recite the findings as to the rights of the parties, and the practicability of actual partition*], and on reading and filing proof of due service of notice of this motion on all the defendants who have appeared, now, on motion of M. N. for the plaintiff, after hearing O. P. for the defendant W. X., [*or no one appearing*] in opposition.

It is Ordered and adjudged [That said exceptions be

disallowed and overruled, and that said report be, and the same hereby is, in all respects confirmed, and] that the rights and interests of the several parties to this action, are as stated and set forth in the said referee's report; to wit, that the plaintiff A. B. is entitled [*setting forth the rights of the parties, as determined*]. And it is ordered and adjudged that the said report, and all things therein contained, do stand ratified and confirmed.

And it is further Ordered and adjudged, That all and singular the premises mentioned in the complaint in this action, and described as follows: [*description*] be sold by public auction, in the county of _____, by and under the direction of R. F., of said county [the referee above named]; that the said several lots be sold separately, or in such portions as to the said referee may be most for the interest of the parties interested therein; that the said referee give six weeks' previous notice of the time and place of such sale, in one of the public newspapers printed in said county where the said premises are situated, and in such other manner as is required by law and the rules and practice of this court; and the plaintiffs or any of the parties to this action, may become the purchaser or purchasers thereof; that such sale shall be for cash [*or, that said referee may receive such proportion of the price in cash, and give such credit for the balance, taking security therefor as he may think proper, and as may be consistent with the provisions of this judgment*]; that the said referee, forthwith after said sale, make report thereof to this court; and after his report of sale shall have been duly confirmed, and the judgment of this court entered, that then he execute a deed of deeds of the said premises, to the purchaser or purchasers at the said sale, on their complying with the conditions upon which the deeds are to be delivered; and that such sale and conveyance be valid and effectual forever.

And it is further Ordered and adjudged, That the costs of the parties to this action, to be taxed, be first apportioned between the said several parcels of land and prem-

ises ratably, and paid out of the proceeds of the sale thereof, in proportion to the sums for which they respectively sell; the same to be paid to the respective attorneys of the parties; and that said referees in like manner, retain out of the proceeds of the sale of each] the fees, commissions and disbursements to which he is entitled on such sale; that the said referee do pay and discharge out of the proceeds, all taxes, charges and assessments which may be a lien upon the said premises, or any part thereof; and if the same are a lien upon a part only, then that such referee pay the same out of the proceeds of such part, and specify the same in his final report.

[*Where there is a creditor entitled to be paid, add :*]

And it is further Ordered and adjudged, That said referee pay to S. T., the sum of dollars, with interest thereon, from the day of , 18 , out of the share or proportion of the defendant, W. X., in the proceeds arising from said sale, that being the amount of the specific lien [by mortgage] upon his part of the lands and premises aforesaid.

[*Where there are dower rights, add :*]

And is further Ordered and adjudged, That the said referee ascertain and report whether the defendant, U. V., widow of W. V., deceased, is willing to accept in lieu and instead of her dower interest in the premises aforesaid, a sum in gross in satisfaction thereof, out of the net proceeds of the one part of the said premises, whereof her husband died seized, according to her rights as ascertained in the report of the said referee; and what would be a reasonable satisfaction for interest on the principles applicable to life annuities; and, if the said U. V. consent to accept such gross sum, that such referee pay the same to her, upon her executing, acknowledging and delivering to the said referee, a release to be approved of by said referee, of all her right, title and interest in the premises, and every part thereof. But if she refuse to accept a gross sum in lieu of her dower interest, then it is further ordered and adjudged, that the said referee, after paying the costs and

disbursements, taxes, charges and assessments, do bring one-third of the one part of the net proceeds of the said sale into this court, to be invested for her benefit ; the interest or dividends thereon, or to accrue thereon, to be paid over to her during her natural life.

And it is further Ordered and adjudged, That the said referee pay to the plaintiff one equal part of the residue of net proceeds of the sale of the said premises ; one other equal part to [etc., awarding the proceeds according the rights of the parties]; and that the referee take receipts for all such payments, and file them with his report to be made of his proceedings, subsequent to the confirmation of his report of sale.

And it further Ordered and adjudged, That such title, deeds and writings, as may be in the possession or under the control of any, or of either of the parties, and as appear to relate solely to any particular part of said premises, be delivered up to the purchaser of such part; and that all other title-deeds or writings relating to such premises be deposited with the clerk of this court, in the county of , for safe custody, there to remain for the benefit of all parties interested therein.

And it is further Ordered and adjudged, That the purchaser or purchasers of any or either of said lots of land, at such sale, be put into possession thereof ; and that any of the parties to this action who may be in possession of such premises, or any part thereof, and any person who, since the commencement of this action, has come into possession of them, or either of them, deliver possession thereof to such purchaser or purchasers, on production of the referee's deed for such premises.

And it is further Ordered and adjudged, That the said referee make a report of his proceedings under this order, subsequent to the confirmation of his report of sale to be made as above directed.

No. 31.

**Order modifying Interlocutory Judgment
on Report of Commissioners that sale
is necessary.**

New York Code Civ. Pro. § 1560.

At, etc. [as in Form No. 24].

[Title of cause.]

On reading and filing the report of commissioners appointed to make partition of the property sought to be partitioned in this action, which report is dated , 18 , and by which it appears that the said property [or, that the portion of said property described in said report, to wit: *[describe same]*] is so circumstanced that a partition thereof cannot be made without great prejudice to the owners thereof, and due notice of this motion having been given to the [attorney for the] guardian ad litem for the infant defendants, and the attorneys who have appeared for other defendants, and the court being satisfied that said report is just and correct.

It is hereby Ordered, on motion of C. E., counsel for the plaintiff, after hearing, etc. [or, no one appearing on the part of the defendants], That the said interlocutory judgment be and the same is hereby modified so as to provide for the sale of the said property in the manner and upon the notice required by law, by M. N., who is hereby appointed referee for the purpose of making such sale [or, by the sheriff of county] and that said referee [or, sheriff], may give credit to the purchaser or purchasers upon such sale for years, for the part of the purchase money of said premises, to be secured as follows: *[State security and other matters proper to be inserted in case of sale; see Form No. 24.]*

And it appearing by the search of the clerk of the county of , and by the affidavits of A. M. and C.

G., therewith produced, that there is no creditor not a party, who has a lien upon the undivided share or interest of a party, it is ordered that a reference as to such liens is dispensed with.

No. 32.

Notice by Referee to Creditors to prove Liens before him.

New York Code Civ. Pro. § 1562.

Supreme Court, New York.

H. L., plaintiff,
v.
M. L., defendant.

I, the undersigned, duly appointed referee, by order of this court, dated and entered herein on the day of , 18 , hereby require each person not a party to the action who, at the date of the said order, had a lien upon an undivided share or interest of any of the owners or persons interested in the premises hereinafter described, to appear before me on or before the day of , 18 , at my office No. Broadway, New York city, to prove his lien and the true amount due, or to become due, to him by reason thereof.

The premises are described in the complaint in the above entitled cause as follows: [insert description.]

Dated New York City, , 18 .

J. W., as referee.

E. H. R.,

Plaintiff's Attorney,
Beekman St., New York city.

No. 33.

Notice of Sale.

[*Title of cause.*]

By virtue of an [interlocutory] judgment of partition and sale, made in the above entitled action on the day of , 18 , the subscriber, a referee for that purpose duly appointed, will sell, at , in . on the day of , 18 , at o'clock in the noon of that day, the real property directed by said judgment to be sold, and therein described as follows(:) [*description of premises.*]

M. R., Referee.

Dated , 18 .

Another Form for Notice of Sale.

[*Title of cause.*]

Notice is hereby given, that the real property described as follows: [*description of land,*] will be sold by the undersigned referee [*or, sheriff of* county], at public auction, at , in the city of , in the county of , at o'clock in the noon on the day of , 18 , pursuant to the [interlocutory] judgment of partition made and entered in the above entitled action in this court, on the day of , 18 .

L. M., Referee [*or, Sheriff.*]

Dated , 18 .

Another Form.

Supreme Court, City and County of New York.

E. T., plaintiff,
 v.
 R. T. and others, defend'ts.

In pursuance of a judgment of partition and sale duly made and entered in the above entitled action and bear-

ing date at a special term, on the day of , 18 , I, E. W., the undersigned, the referee duly appointed, to execute the said judgment to make the sale thereunder, will sell, at public auction, at the Real Estate Exchange and Auction Room, limited, at Nos. 59-65 Liberty street, in the city and county of New York, on the day of , 18 , at 12 o'clock noon, by J. L. P., auctioneer, the premises in said judgment mentioned and therein described as follows, to wit : [describe them.]

E. P. W., Referee.

Dated , 18 .

J. C. & B., Attorneys for Plaintiff,
Wall St., New York city.

No. 34.

Referee's Report of Sale in Partition, Foreclosure, or other Action.

[Title of cause.]

To the court of :

In pursuance of a judgment of this court, in this action, bearing date the day of , 18 , I, R. F., referee, to whom the execution thereof was confided, do report.

That I caused notice of the time and place of sale of the premises mentioned in the judgment, containing a brief description thereof, to be published [*here state mode, so as to show compliance with the directions of the judgment and rules of court*]. And agreeably to said notice, I did, at the time and place specified in the notice, to wit, the day of , 18 , at noon, attend at the in said city, and expose said premises for sale, by public auction to the highest bidder.

And I further report, that the said premises were then and there fairly struck off and sold to M. N. for dollars, he being the highest bidder therefor, and that being the highest sum bid for the same.

[Or, where there are several parcels]: And I further

report, that the several lots or parcels of land so directed to be sold as aforesaid, were put up for sale separately, and were each and every one of them fairly struck off and sold to M. N., for the following sums respectively : [*here name the parcels and prices*]; those sums being the highest sums bid for the said lots respectively, and the said M. N. being the highest bidder therefor ; which several sums amount, in the aggregate, to dollars.*

And I do further report, that I received from the said purchaser the amounts so bid by him as above mentioned, and that thereupon I executed, acknowledged, and delivered to said purchaser the usual referee's deed for said premises, and that I have paid over and disposed of the purchase or proceeds of sale as follows, viz.:

I have retained in my hands the sum of dollars, being the amount of my fees and expenses on said sale.

I have paid [*here enumerate in detail the payments made, according to the judgment; and in case of a surplus in foreclosure, add :]*] and I have deposited the balance, being the sum of dollars, in the hands of the county treasurer of county to the credit of the clerk of this court, as directed by said judgment.

[*In case of a deficiency in foreclosure, substitute for the foregoing sentence.*] And I have paid the plaintiff, through his attorney, the whole of the residue, being the sum of dollars; and I also report, that the deficiency due to the plaintiff from the defendant Y. Z., and for which he is personally liable under the judgment herein, is dollars, with interest from the date of this my report.

I have taken receipts for the sum so paid, which are hereto annexed.

The schedule hereto annexed contains a statement of the sums thus received and paid out.

[I do also report, that I have let the said M. N. into possession of said premises.]

All which is respectfully submitted.

[*Date.*]

36

[*Signature.*]

No. 35.

The same, where the Purchaser has not completed his Purchase.

*[As in preceding form to the *, concluding thus :]*

That the terms and conditions of such sale were reduced to writing, and made known to the persons attending such sale, previous to putting up said premises, and were as follows: [that the purchaser of each lot or separate parcel was to pay ten per cent. of the purchase money down, on the day of sale, and the residue when the sale should be confirmed and the deed delivered.] And that the said M. N. has signed the written conditions of sale above mentioned, together with an acknowledgment that he has purchased the premises upon those terms, and he has paid to me the amount required to be paid down.

All of which is respectfully submitted.

[Date.]

[Signature.]

No. 36.

Report of Sale in Partition.

[Title of action.]

To the supreme court of the State of New York :

In pursuance of an order made in this court in the above action, and dated the day of last, I, the subscriber, referee, duly appointed, to whom the execution thereof was confided, do report :

That having caused a notice of the time and place of sale of the premises mentioned in said decretal order, containing a brief description thereof, to be published, once in each week, for six weeks immediately previous to such

sale, in one of the public newspapers printed in the county of , where such premises are situated, and having also caused a copy of such notice to be put up at three of the most public places in the city of , where the said premises are situated : I did, on the day of , 18 , at 12 o'clock, noon, that being the time specified in the said notice, attend at the rotunda of the Merchants' Exchange in said city, the place therein mentioned, and exposed the said premises for sale, at public auction, to the highest bidder, as directed by said order.

I do further report, that the several lots or parcels of land so directed to be sold as aforesaid, were put up for sale separately, and were each and every one of them struck off to T. B., for the following sums : lot No. 1, for the sum of dollars ; lot No. 2, for the sum of dollars ; and lot No. 3. for the sum of dollars ; those sums being the highest sums bidden for the said lots respectively, and the said T. B. being the highest bidder therefor ; which several sums amount, in the aggregate, to dollars.

That the terms and conditions of such sale were reduced to writing, and made known to the persons attending such sale, previous to putting up the said lots, and were as follows : the purchaser or purchasers of each lot, or separate parcel, were to pay ten per cent. of the purchase money down, on the day of sale, and the residue when the sale should be confirmed and the deed delivered; and that the said T. B. has signed the written conditions of sale above mentioned, together with an acknowledgement that he has purchased the premises upon those terms, and he has paid to me the amount required to be paid down.

All of which is respectfully submitted.

Dated , 18 .

A. B., Referee.

No. 37.

Final Report after Sale in Partition.

[*Title of action.*]

To the supreme court of the State of New York :

In pursuance of an order of this court, made the day of , 18 , I, the subscriber, do respectfully report :

That in obedience to the said order, I have executed, acknowledged, and delivered to L. B., the purchaser of the premises directed to be sold by me, a deed of such premises, on receiving from him the sum of dollars, the price or sum for which the said premises were sold to him, as mentioned in my former report of such sale, made in pursuance of said order, bearing date the day of last past ; and upon his complying with all the conditions upon which the said deed was to be delivered.

And I further report, that I have paid to the attorney for the plaintiff in this action, the sum of dollars, for the costs of the plaintiff as taxed in this action, and have taken a receipt therefor, which is hereto annexed; that I have paid M. S., the guardian ad litem of the infant defendants, the sum of dollars, being the amount of his costs, as taxed, and have taken his receipt therefor, which is hereto annexed ; that I have retained in my hands the sum of dollars, being the amount of my fees and disbursements on said sale ; that I have paid to the collector of the town of the sum of dollars, for taxes upon the said premises ; that I have paid the defendant M. C., the sum of dollars, being the amount reported due to him upon his mortgage on the said premises; that I have paid to C. M., dollars. due on his judgment against the plaintiff in this action.

And I further report, that the residue of the net proceeds of the sale of the said premises, I have divided and distributed as follows : to the plaintiff, the sum of

dollars, which, with judgment docketed against him and paid as above, is his share of the distributive proceeds ; to the defendant R. M., the sum of dollars, which, with the amount paid to satisfy the said bond and mortgage, is his share of the distributive proceeds ; and to the defendant R. C. and wife the sum of dollars, being their share of the said proceeds, in right of the said wife ; and the remaining share of dollars belonging to the infant defendants, subject to the dower interest of their mother, [she declining to receive a gross sum in satisfaction thereof,] I have now brought into court that the same may be invested for their benefit. And that I have taken from the plaintiff and such defendants as have received their shares, their respective receipts for the several amounts paid to them as aforesaid

And I further report that I have let the said L. B. into the possession of the premises so purchased by him.

All of which is respectfully submitted.

Dated , 18 .

A. B., Sole Referee.

No. 38.

Referee's Report of Sale in Partition Suit.

New York Code Civ. Pro. § 1576.

[*Title of cause.*]

To the supreme court of the State of New York [*or, name other court*] :

In pursuance of an interlocutory judgment made in the above entitled action, on the day of , 18 , I, the subscriber, the referee duly appointed by said judgment, do hereby respectfully report :

That having caused a printed [*or, written*] notice of

the time and place of sale of the premises mentioned in the said judgment and thereby directed to be sold to be conspicuously fastened up, at least forty-two days before the sale, in three public places in the town [*or, city*] where the sale was to take place [and also in three public places in the town [*or, city*] where the said property is situated], and having caused a copy of said notice to be published, once in each week of the six weeks immediately preceding the sale, in a newspaper published in the county of [*or, in the newspaper printed at Albany, in which legal notices are required to be published*], I did, on the day of , 18 , at o'clock in the noon, that being the time specified in the said notice, attend at the [American hotel], in the village of , the place therein mentioned, and exposed the said premises for sale, at public auction to the highest bidder, as directed by said judgment.

I do further report, that the several lots or parcels of land so directed to be sold, as aforesaid, were put up for sale separately, and were, each and every one of them, struck off to J. K. for the following sums: the lot described as follows [*describe it*], for the sum of dollars; the lot described as follows [*describe it*], for the sum of dollars; those sums being the highest sums bidden for the said lots respectively, and the said J. K. being the highest bidder therefor; which several sums amount in the aggregate to dollars.

That the terms and conditions of such sale were reduced to writing, and made known to the persons attending such sale, previous to putting up the said lots, and were as follows: the purchaser or purchasers of each lot, or separate parcel, were to pay ten per cent. of the purchase money down on the day of sale and the residue when the sale should be confirmed and the deed delivered [*or state other terms of sale, or annex a copy of the terms of sale and refer to it*]; and that the said J. K. has signed the written conditions of sale above mentioned, together with an acknowledgment that he has purchased the prem-

ises upon those terms, and he has paid me the amount required to be paid down.

All of which is respectfully submitted.

Dated , 18 .

M. R., Referee

County, ss :

M. R., of , being duly sworn, says, that he is the referee mentioned in and who subscribed the foregoing report of sale, and that the statements contained in said report are true to the best of his knowledge and belief.

[*Jurat.*]

M. R.

No. 39.

Affidavit on Application by Party for Money Paid into Court by Referee.

New York Code Civ. Pro. § 1564.

[*Title of cause.*]

County, ss :

A. B., of , being duly sworn, says, that he is one of the defendants in the above entitled action ; that said action was brought for the partition of certain real property situated in the county of , in which deponent had the one- interest.

That by the interlocutory judgment entered in said action on the day of , 18 , a sale was directed of [a portion of] said real property by M. R., who was appointed referee for the purpose of making such sale.

That, under the directions of said judgment, the sum of dollars was paid into court and to the county treasurer of county by said referee, being the proceeds of the sale of said share or interest of deponent in said property sold, and that said sum is now in the hands of the said county treasurer.

And deponent further says, that his said interest in said property was, at the time of such sale, subject to the

lien of a certain mortgage, executed by this deponent to F. C., dated , 18 , and recorded in county clerk's office on the day of , 18 , in book of mortgages No. . at page [or describe other incumbrance].

That said F. C. is now the owner of said [mortgage], and that said F. C. resides at , in the of , in the state of .

[Or, that deponent has made diligent search and inquiry as to the name and place of residence of the present owner of said mortgage, as follows [here state efforts made], and, that so far as can be ascertained by this deponent, the name of said owner is M. N., whose place of residence is at , in the state of .]

That the amount actually due upon the said mortgage is the sum of dollars, and that there are no other incumbrances upon the said share of deponent, as he verily believes.

That deponent has caused a notice to be served upon said F. C. of an application to be made at a term of this court, to be held at , on the day of , 18 , for an order directing that the said sum in court [or, that the amount of dollars, out of said sum in court] be paid to deponent by said county treasurer, as will appear from the affidavit of C. I., which is hereto annexed. A. B.

[*Jurat.*]

No. 40.

Notice of Application to the Court for Moneys.

New York Code Civ. Pro. § 1564.

[*Title of cause.*]

To F. C., of

Take notice, that an application will be made [upon the affidavit herewith served upon you] at a [special]

term of the [supreme] court, to be held at , on the day of , 18 , at the opening of the court on that day, or as soon thereafter as counsel can be heard, by C. B., a defendant in the above entitled action, for an order directing that the sum of dollars [part of the amount] paid into court by the referee who made the sale under interlocutory judgment of certain real property in partition in said action in which said C. B. had an interest and now in the hands of the county treasurer of county, be paid to said C. B.

This notice is given to you as the owner of a certain mortgage executed by said C. B. to , dated , 18 , and recorded in the county clerk's office, on the day of , 18 , in book No. of mortgages, at page [or describe other lien], which said [mortgage] was [or appeared to be] a lien upon the said interest of said C. B. in said property sold at the time of such sale [the amount for which such application is to be made, as aforesaid, being the balance of said money paid into court above the amount claimed to be due upon said [mortgage]].

Dated , 18 .

T. R., Attorney for said C. B.
[Office address.]

No. 41.

Affidavit of Service upon Owner of incumbrance of Application by Owner for Moneys.

New York Code Civ. Pro. § 1564.

[Title of cause.]

County, ss :

C. M., of , being duly sworn, says, that on the day of , 18 , he served a copy of the annexed notice, and of the affidavit therein referred to, on F. C., of , to whom said notice is directed,

by delivering said copy to him, personally, at the
of _____, in the State of _____ [*or*, by leaving said
copy at the residence of said F. C., at _____, in the
State of _____, with a person of suitable age and
discretion, to wit, of the age of at least _____
years].

[*Jurat.*]

C. M.

No. 42.

Consent of Party to accept Gross Sum in lieu of Dower, etc.

New York Code Civ. Pro. § 1569.

[*Title of cause.*]

I, M. B., one of the defendants in the above entitled action, having a right of dower [*or*, as tenant for life; *or*, as tenant for the term of _____ years] in the undivided share of the [defendant], F. B., in the [portion of the] premises described in the complaint in this action, of which a sale has been made, do hereby consent to receive from the proceeds of such sale a gross sum, to be fixed according to the principles of law applicable to annuities, in satisfaction of my said estate, right and interest in said premises.

In witness whereof, I have hereunto set my hand,
this _____ day of _____, 18 _____. M. B.

In presence of _____.

[*Acknowledgment as prescribed by the law.*]

No. 43.

Release by Married Woman of Inchoate Dower Right to her Husband.

New York Code Civ. Pro. § 1571.

[*Title of cause.*]

I, F. M., wife of the defendant, C. M., and one of the defendants in the above entitled action, do hereby release

to the said F. M. my inchoate right of dower in the [portion of the] property described in the complaint herein, directed to be sold by the interlocutory judgment entered herein, to wit : [describe property.]

In witness whereof, I have hereunto set my hand and seal, this day of , 18 .

F. M. [L. S.]

In presence of .

[Acknowledgment as prescribed by law.]

No. 44.

Final Judgment in Partition Suit, on Confirmation of Referee's Report of Sale.

New York Code Civ. Pro. § 1577.

At, etc. [as in Form No. 24].

[Title of cause.]

This cause coming on for a final hearing upon the report of the referee appointed to make sale of the property sought to be partitioned in this action, which report bears date on the day of , 18 , and due notice having been given to the attorneys for the parties defendant who have appeared therein, and to the [attorney for the] guardian ad litem of the infant defendants, of this application for the confirmation of said report and for final judgment thereupon ; and on motion of I. J., for the plaintiff, after hearing J. M., for the defendant, E. G. [or, no one appearing for the defendants] :

It is Ordered and adjudged, That said report, and the sale therein mentioned, be and the same are hereby in all things confirmed, and that said referee execute to the purchaser, upon said sale, a conveyance of the property sold, upon his complying in all respects, with the terms upon which the said sale was made, as stated in the said referee's report ; and that the said referee first deduct

from the proceeds of said sale the fees and disbursements to which he is entitled on such sale, and that the said referee pay all taxes, assessments and water-rates, which are liens upon the property sold, and redeem the property sold from any sales for unpaid taxes, assessments of water-rates which have not apparently become absolute, and that the costs and expenses of the proceedings in this suit, which are adjusted according to law at the sum of dollars, be deducted from the proceeds of such sale, and that the said referee pay the same to the plaintiff's attorney.

And it is further ordered and adjudged, that the said referee pay to the [attorney for the] guardian ad litem of the infant defendants, out of the proceeds of such sale, the sum of dollars, for his costs in this action.

And the defendant, M. B., having by her written consent, duly acknowledged [*or, proved*], and filed, consented to receive a gross sum from the proceeds of such sale, to be fixed according to the principles of law applicable to annuities, in satisfaction of her right of dower in the premises sold :

It is hereby ordered and adjudged, that the said amount, which has been fixed by the court at the sum of dollars, be paid out of the residue of said proceeds of sale remaining after paying the costs and expenses aforesaid, to the said M. B., upon her receipt therefor, in satisfaction of her said dower right.

[*Or*, that out of the residue of said proceeds of sale remaining after paying the costs and expenses aforesaid, the said referee pay the one-third part into court for the purpose of its being invested for the benefit of the defendant, M. B., such investement to be made in permanent securities, at interest, and the interest to be paid from time to time, as it accrues, to the said M. B., during her life.]

And it is further ordered and adjudged, that the said referee pay and distribute the residue of the proceeds of such sale, remaining after paying therefrom the said

costs, expenses, taxes and assessments, and providing for the said dower interest of said defendant, M. B., as follows, viz. : to the plaintiff and the defendants, F. G., M. G. and D. F., each the one part thereof; to the defendant B. G. the one part thereof, on his obtaining the release of his wife, the defendant, P. G., to him, of her inchoate dower interest in said premises, duly executed and acknowledged as required by law; or, if said P. G. shall not execute such release, then that said referee pay over to her the sum of dollars, which is hereby fixed as the proportional value of her said dower right, according to the principles of law applicable to annuities and survivorships, in full discharge of her said dower right [*or, insert other directions which may be proper in such case.*]

And that said referee pay to the defendant, S. G., the one part of said residue, upon the joint receipt of herself and her husband, M. G.; or, if said M. G. shall refuse to execute such receipt, then that said referee pay the one part of said proceeds, to which the said S. G. would be entitled, into court.

And that said referee pay to the defendant, J. C., as executor and trustee, named in the will of S. F., deceased, the one part of said residue, to be held by him in trust, to receive the rents and profits thereof, and apply the same to the use of [the defendant] said F. B., during his life, in accordance with the provisions of the said will.

And that said referee bring into court, to be invested in permanent securities, at interest, in their names and for their benefit, the two one- parts of said residue to which the infant defendants, M. F. and G. H., are entitled; and that said referee bring into court, and deposit with the county treasurer of county, subject to the order of this court, the one equal part of such residue for the benefit of owners unknown, to be invested in permanent securities, at interest, for their benefit, until claimed by them or their legal representatives.

And it is further ordered and adjudged, that said

referee take receipts for the amounts so paid by him, and file them with his final report, to be made subsequent hereto.

And it is further ordered and adjudged, that the said purchaser be let into possession of the said property, and that any of the parties to this action who may be in possession of said premises, or any part thereof, and any person who, since the commencement of this action, has come into the possession of said property sold, or any part thereof, deliver possession thereof to such purchaser, on production of the referee's deed of said premises.

And it is further ordered, that the said referee make a report of his proceedings under this judgment.

No. 45.

Order Confirming Referee's Report of Sale.

At a special term, etc.

[*Title of cause.*]

On reading and filing the report of R. F., Esq., referee, appointed to sell the premises described in the complaint in this action, which report bears date the day of , 18 , and on filing proof of service of due notice of this motion on all the parties who have appeared in this action :

Ordered, That the said report be, and the same is hereby in all respects confirmed.

No. 46.

Notice of Motion to compel Purchaser to complete his Purchase.

[*Title of cause.*]

Take notice, that on the affidavit of which a copy is herewith served, and on the judgment and proceedings in

this cause, the undersigned will move this court, at a special term thereof, to be held in the court-house, in the city of , on the day of , at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order requiring you to complete your purchase mentioned in said affidavit, and to pay the amount bid therefor, and for such other relief as may be just, together with the costs of this motion.

[Signature.]

[Date.]

[Address to purchaser.]

No. 47.

Affidavit to accompany the above Notice of Motion.

[Title of cause.]

State of , county of , ss.:

, being duly sworn, says, that he is the attorney for the plaintiff in this action; that the action was instituted for the partition of certain real estate, or the sale thereof, the same being fully described in the complaint herein; that said premises were offered for sale in accordance with the law in such case made and provided, and in pursuance of proper notice thereof, and under the direction of the sheriff of county [*or*, of R. F., referee, duly appointed for such purpose], whose report of sale is hereto annexed, on the day of , 18 , under the usual terms of sale, and purchased by ; that by the terms of the sale, the deed was to be delivered to the purchaser, and the purchase money was to be paid to the said sheriff [*or*, referee] on or before the day of , 18 , that said purchaser declines to complete his purchase, alleging that the proceedings in the action are irregular

and void, as follows: . deponent further states, that the affidavit of the said sheriff [or, referee] making such sale, is hereto annexed.

[Signature.]

[*Jurat.*]

No. 48.

Order compelling Purchaser to complete his Purchase.

At a special term, &c.

[*Title of cause.*]

On reading and filing the affidavit of , attorney for the plaintiff, and the report of the sheriff making the sale, and after hearing , counsel for the plaintiff, in favor of the motion, and , in opposition thereto:

Ordered, That the said motion be, and the same hereby is* granted, and that , the purchaser of the premises as set forth in said affidavit, and in the report of the referee, be, and he hereby is directed to complete the purchase of the premises within days from the service of a certified copy of this order upon him.

No. 49.

Order Discharging Purchaser.

[*As in preceding form to the *, then continuing*] denied, and that the , purchaser, be discharged from his said purchase, and that the referee conducting said sale, shall repay to said purchaser all moneys paid by him to said referee upon said purchase.

And it is further ordered, that the plaintiff in this

action, on demand, pay to the said , the purchaser aforesaid, his expenses of examining the title, which are hereby fixed and allowed at the sum of dollars, together with dollars, costs of this motion.

[In case the court should set aside the sale, the order will be as follows:] And that the sale be set aside, on condition that the defendant moving for the same pay to , the purchaser, upon demand, his costs and expenses attending the purchase, which are hereby fixed and allowed at dollars, together with dollars, costs of attending this motion.

And it is further ordered, that if the said condition be complied with, the plaintiff be at liberty to cause the said premises to be again exposed for sale by the same referee, and according to the directions in the judgment in this action; and that the costs and expenses of the former notice and sale on the part of the plaintiff, to be ascertained and declared by said referee in his report of such second sale, be included in the costs of this action, and be chargeable with the other costs of this action, upon the premises to be sold; and that a copy of this order be forthwith served upon the attorney for the plaintiff, and also on the purchaser, or his counsel.

No. 50.

Affidavit to move to substitute successor in interest as a Defendant on death of one of two or more Plaintiffs or Defendants in Partition.

New York Code Civ. Pro. § 1588.

[Title of cause.]

county, ss.

A. B., of , being duly sworn, says, that he is one of the plaintiffs [*or, the plaintiff's attorney*] in the above

entitled action ; that such action is brought for the partition or sale of real property situated in the county of _____, and the place of trial of said action is said county of _____ ; that after said action had been commenced, and [*state the condition of action*], F. C., one of the plaintiffs [*or, defendants*] therein, departed this life ; that M. C. is the [*state relationship*], and sole heir-at-law of said F. C. [*or set forth other means of succession*], and as such, has succeeded to the interest of said F. C. in the property described in the complaint, and sought to be partitioned herein ; that said M. C. is not a party to this action.

[*Jurat.*]

A. B.

No. 51.

Order substituting successor in interest as a Party Defendant in case of death of one of two or more Plaintiffs or Defendants.

New York Code Civ. Pro. § 1588.

At, etc. [*as in Form No. 24*].

On reading and filing the affidavit of A. B., dated _____, 18_____, by which it appears that F. C., one of the plaintiffs [*or, defendants*] in this action, has died since the commencement thereof, with proof of due service of notice of this action on M. C., the [heir at law] of said F. C., who as such has succeeded to the interest of said F. C., in the premises sought to be partitioned herein, and on [*name any other parties served*], and on reading [*name opposing papers*] :

Now, on motion of J. G., for the plaintiff, after hearing, etc., [*or, no one appearing to oppose*] :

It is hereby ordered, that said M. C., be and is hereby made a 'party plaintiff [*or, defendant*] in this action [and that a supplemental summons issue to bring in the said M. C. as such defendant].

No. 52.

Petition of General Guardian of Infant or Committee of Lunatic, etc., for authority to agree to Partition.

New York Code Civ. Pro. § 1591.

To the supreme court [or, name other court]:

The petition of M. B., of , respectfully shows :

That he is the general guardian of C. B., an infant who resides in the of , in the county of , [or insert other description of petitioner].

That said C. B. is the owner, as joint tenant [or, tenant in common], with F. D., of the real property situated in the of , in the county of , which is described as follows : [insert description.]

That said C. B. is the owner of the one equal undivided one part of said property, and said F. D. is the owner of the one equal, undivided part thereof.

That it is proposed to make a partition of such property, and to give to said C. B., in severalty, the following described lots, pieces or parcels thereof, to wit : [describing them], and to said F. D., in severalty, the following described lots, pieces or parcels thereof, to wit : [describing them.]

That M. H., of , is the [state relationship] of said infant, etc., and F. R., , is the [state relationship] of said infant, etc., [or state other facts necessary to enable the court to give proper notice of the application].

That [here state anything further proper to be stated in regard to the rights and interests of the owners].

And your petitioner prays that authority may be given by this court to your petitioner to agree to the partition of said real property in the manner aforesaid.

[Verification as prescribed by the law.]

M. B.

No. 53.

Notice of Motion for authority to agree to Partition.

New York Code Civ. Pro. § 1591.

[Title of proceeding.]

Sir:—Take notice, that upon the petition, with a copy of which you are herewith served, a motion will be made, at a term of the court, to be held at, etc., on etc., at the opening of the court, or as soon thereafter as counsel can be heard, for an order granting the prayer of the said petitioner, and for such other and further relief as may be proper.

Dated , 18 ,

Yours, etc.,

M. N., Attorney for Petitioner.

[Office address.]

To M. H., F. R., etc.

No. 54.

Order granting leave to agree to Partition.

New York Code Civ. Pro. § 1591.

At, etc. *[as in Form No. 24].**[Title of proceeding.]*

On reading and filing the petition of M. B., as general guardian of C. B., an infant *[or, insert other description of petitioner]* dated , 18 , with proof of due service of a copy thereof and of notice of this motion on C. B., M. N., and F. R., and on reading *[name opposing papers]*, and on motion of G. H., of counsel for said petitioner, after hearing, etc. *[or, no one appearing to oppose]:*

It is hereby Ordered, * That the prayer of said petition be, and is hereby granted, and that leave is hereby granted to said M. B., as such guardian, etc., to agree to the partition of the real property described in said petition, in the manner specified in said petition, and to execute releases of the right and interest of said infant, etc., in and to that part of the property which falls to the shares of the other joint tenants [or, tenants in common thereof].

[*Or as above to *, and from thence as follows :]* That it be referred to I. M., of _____, to take testimony as to and report upon the merits of such application, and as to whether the interests of said C. B. will be promoted by such a partition, and that he make his report thereupon with all convenient speed.]

No. 55.

Order to Show Cause why the Application should not be Granted.

New York Code Civ. Pro. § 1591.

At, etc. [*as in Form No. 24*].

[*Title of proceeding.*]

On the annexed petition of M. B., as general guardian of C. B., an infant [*or insert other description of petitioner*], and on motion of G. H., of counsel for said petitioner :

It is hereby Ordered, That M. H., of _____, and T. R., of _____, show cause, at a _____ term of this court, to be held, etc., why the prayers of the said petition should not be granted.

And it is further ordered, that a copy of this order, together with a copy of said petition, be served upon said C. B., M. H., and F. R., on or before the _____ day of _____, 18____,

No. 56.

Order on Return of Order to Show Cause.

New York Code Civ. Pro. § 1592.

At, etc. [as in Form No. 24].

[Title of proceeding.]

On reading and filing the petition, dated , 18 , of M. B., general guardian of A. B., an infant [or other description.], for authority to agree to the partition of the real property of said A. B., described in the said petition, an order to show cause at this term why the prayer of said petitioner should not be granted, with proof of due service upon C. B., M. H., and F. R., of a copy of said petition and of said order, and on reading [name opposing papers]: and after hearing G. H., for said petitioner, and R. H., for [or, no one appearing to oppose]:

It is hereby Ordered, [conclude as in Form No. 54 from *].

No. 57.

Referee's Report as to merits of Application for authority to make Partition.

New York Code Civ. Pro. § 1592.

[Title of proceeding.]

To the court:

I, I. M., to whom it was referred, by order of this court, dated , 18 , to take testimony and report as to the merits of the application of M. B., general guardian of C. B., an infant [or other description], for authority to agree to the partition of the real property of said A. B., described in said petition, do hereby report :

That I have been attended by counsel for the petitioner, and for [name any other parties attending reference], and have taken testimony as to such application, and have come to the conclusion, after carefully considering the matter, that the interests of the said C. B. will be promoted by such partition, my reasons therefor being as follows [state reasons]. I have annexed to this, my report, my minutes of testimony taken before me, marked "Schedule A," and which forms part of this, my report.

I. M., Referee.

Dated , 18 .

No. 58.

Order upon Referee's Report.

New York Code Civ. Pro. § 1592.

At, etc. [as in Form No. 24].

[Title of proceeding.]

On reading and filing the report of J. M., appointed referee herein by an order of this court, made and entered on the day of 18 , with proof of due service of notice of this application on C. B., M. H., and F. N., and on reading [name opposing papers]; and after hearing G. H., of counsel for the petitioner, and R. F., for [or, no one appearing to oppose]:

It is hereby Ordered, the court being of the opinion that the interests of C. B., the [infant] named in said petition in this proceeding, will be promoted thereby, That the said report be, and the same is hereby, in all things, confirmed, and that F. B., the said petitioner, be, and he is hereby authorized to agree to the partition of the real property of said C. B., described in said petition, and, in the name of the said C. B., to execute a release of his right and interest in and to that part of the said property, which falls to the share of F. D., the joint tenant [or, tenant in common, with said C. B., of said property].

No. 59.

Notice of Lis Pendens.

[*Title of action.*]

Notice is hereby given, that an action has been commenced in this court upon a complaint of the above named plaintiff against the above named defendants, for the purpose of obtaining a partition and division of the premises therein described, among the owners thereof, by commissioners to be appointed for that purpose, or, if a partition of said premises cannot be had, then for a sale of the same under the direction of this court, and for a division of the proceeds of such sale among such owners, according to their several and respective rights and interests therein. The said premises are described as follows: [*insert description.*]

Clerk will index the names of

_____, Plaintiff's Attorney.

No. 60.

Notice which may be affixed to the Summons of No Personal Claim.

[*Title of action.*]

To the above named defendants :

Take notice, that the summons served upon you in this action is issued upon a complaint praying the partition and division of the premises therein described, among the owners thereof, by commissioners to be appointed for that purpose, or for a sale thereof, under the direction of this court, and for a division of the proceeds of such sale among such owners, according to their several and respective rights and interests therein.

You will further take notice, that no personal claim is

made against you, or any of the defendants. The premises sought to be divided are described in the said complaint, as follows: [insert description.]

_____, Plaintiff's Attorney.

No. 61.

Deed of Referee in Partition.

This indenture, made the day of , in the year one thousand eight hundred and , between B. B., a referee, appointed by the court of the State of , dwelling in the city of , of the first part, and N. B., of the city and county of , of the second part, witnesseth: Whereas, at a term of the court, held at the in the city of on the day of , 18 , before his Honor , one of the justices of said court, it was among other things ordered, adjudged and decreed, by the said court, in a certain action then depending in the said court, between A. M., plaintiff, and C. M., D. M. and E. M., defendants; that all and singular the premises mentioned and set forth or referred to in the complaint in said action, or so much thereof as are hereinafter particularly described, be sold by or under the direction of B. B., referee appointed by said court, at public auction, in the county where said premises are situated; that the said referee first give public notice of the time and place of such sale, with a brief description of the said premises, according to the practice of the said court. And, whereas, I, the said referee and party of the first part to these presents, in pursuance of the order and decree of the said court, did on the day of the date of these presents, sell at public auction, at the of the in the city of , the said premises hereinafter particularly

described, having first given public notice of the time and place of such sale, with a brief description of the said premises, agreeably to the order aforesaid, at which time and place the said premises were struck off to and purchased by the said party of the second part to these presents, for the sum of dollars ; that being the highest sum bidden for the same.

Now, therefore, this indenture witnesseth : that the said party of the first part, in order to carry into effect the said sale so made as aforesaid, in pursuance of the decree of the said court ; and also by virtue of the statute in such case made and provided, and in consideration of the premises, and of the sum of dollars, paid by the said party of the second part to these presents, to me the said referee, as aforesaid, the receipt whereof I do hereby acknowledge, have granted, bargained and sold, conveyed and confirmed, and by these presents do grant, bargain and sell, convey and confirm unto the said party of the second part, and to his heirs and assigns forever. All [*insert description of the premises,*] together with all and singular the rights, titles, privileges, members, hereditaments and appurtenances to the same belonging, or in anywise appertaining. To have and to hold all and singular the said premises above mentioned and described, and hereby granted and conveyed, or intended so to be, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part; his heirs and assigns forever.

In witness whereof, I, B. B., the said referee, have hereunto set my hand and seal, the, day and year first above mentioned.

[L. S.] B. B., Referee.

[*Add acknowledgment.*]

No. 63.

Referee's Deed in Partition.

This indenture, made this day of , in the year of our Lord one thousand eight hundred and eighty , between referees in the action hereinafter mentioned, of the first part, and , of the second part. Whereas, at a special term of the court of held at , on the day of , one thousand eight hundred and eighty it was, among other things, ordered, adjudged and decreed by the said court, in a certain action then pending in said court, between That all and singular the premises mentioned in the complaint in said action, and hereinafter described, be sold at public auction, according to the course and practice of said court, by or under the direction of the said who was appointed a referee in said action, and to whom it was referred by the said order and judgment of the said court, among other things to make such sale; that the said sale be made in the county where the said premises, or the greater part thereof, are situated; that the referee give public notice of the time and place of such sale, according to law and the rules and practice of said court, and that any of the parties in said action might become a purchaser or purchasers on such sale; that the said referee after said sale, make report thereof to said court, and after his report of sale shall have been duly confirmed, then, that he execute to the purchaser or purchasers of the said premises, or such part or parts thereof as should be so sold, a good and sufficient deed or deeds of conveyance for the same.

And whereas, the said referee, in pursuance of the order and judgment of the said court, did, on the day of , one thousand eight hundred and eighty , sell at public action, at , the premises in the said

order and judgment mentioned, due notice of the time and place of such sale being first given, agreeably to the said order; at which sale the premises hereinafter described, were struck off to the said party of the second part, for the sum of dollars, that being the highest sum bidden for the same, and the said referee's report of said sale having been duly confirmed.

Now this indenture witnesseth, that the said referee, the party of the first part to these presents, in order to carry into effect the sale so made by him as aforesaid, in pursuance of the order and judgment of said court, and in conformity to the statute in such case made and provided, and also in consideration of the premises, and of the said sum of money so bidden as aforesaid, being first duly paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath bargained and sold, and by these presents doth grant and convey unto the said party of the second part. All

To have and to hold, all and singular the premises above mentioned and described, and hereby conveyed, or intended so to be, unto the said party of the second part and assigns to their only proper use, benefit and behoof, forever.

In witness whereof, The said party of the first part, referee as aforesaid, hath hereunto set his hand and seal, the day and year first above written.

Sealed and delivered in presence of

State of , county of , ss.:
On this day of , in the year one thousand eight hundred and eighty , before me, the subscriber, personally appeared to me known to be the same person described in and who executed the within instrument, and acknowledged that he executed the same.

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